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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY,
Petitioner,

v.

BRUNSWICK CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court overturn a jury finding of unlawful monopolization on the ground that the defendant could not have monopoly power as a matter of law, despite findings under agreed upon instructions that (1) defendant had 100% of the relevant market, (2) there were barriers to entry, and (3) the defendant's anticompetitive acts succeeded in keeping others out of the market?

2. May a court overturn a jury finding of unlawful monopolization on the basis of a theoretical economic argument that even a defendant with a 100% share of a market with entry barriers cannot have monopoly power in that market without monopoly power in an upstream market?

PARTIES TO THE PROCEEDINGS

Petitioner Los Angeles Land Company was plaintiff-appellee below. Respondent Brunswick Corporation was defendant-appellant below.

RULE 29.1 STATEMENT

Petitioner has no parent, subsidiary, or affiliated corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Los Angeles Land Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 6 F.3d 1422 and reprinted in the Appendix ("App.") at 1a. The opinion of the district court is reported at 1991-2 Trade Cases (CCH) ¶ 69,661 and reprinted at App. 20a.

JURISDICTION

Petitioner filed suit in the United States District Court for the Central District of California on August 30, 1988 under 28 U.S.C. § 1332(a); 15 U.S.C. §§ 15(a), 22, and 26; and 28 U.S.C. § 1337. After the jury returned a

verdict in favor of petitioner, the respondent noticed an appeal on January 21, 1992 under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on October 13, 1993. Petitioner's timely petition for rehearing was denied on November 12, 1993. App. 36a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any person to "monopolize . . . any part of the trade or commerce among the several States . . . ."

STATEMENT OF THE CASE

1. *Factual Background.*

The basic facts relevant to this petition were accepted as true by the court below and therefore are not at issue. Petitioner Los Angeles Land Company ("L.A. Land") is a real estate development company operating in southern California. It attempted to construct a bowling center, Twin Cities Bowl, in California's Antelope Valley. At the time, the only bowling center in the Valley, Sands Bowl, was owned and operated by respondent Brunswick Corporation ("Brunswick"). App. 2a.

Brunswick is a large, diversified company. One of its divisions owns and operates bowling centers across the nation, including Sands Bowl. Another of its divisions manufactures bowling equipment. *Id.*[1] During the period relevant here, Brunswick was the dominant manufacturer of bowling equipment purchased by new bowling centers in the United States, because Brunswick was "the only option available" for obtaining an integrated package of

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[1] Bowling is a "massive participant sport . . . enjoyed by one out of every three men, women, and children in the country today." National Bowling Conference, *Profile of a Dynamic Market* (1991) at 4. In the United States, "82 million men, women, and children bowl an average of 9.2 times per year." *Id.*

bowling equipment. Reporter's Transcript of Proceedings ("RT") Vol. 2 at 238-240; Trial Exhibit ("Ex.") 51A.[2]

In March 1987, L.A. Land entered into a 99-year lease (with purchase option) on a parcel of land in the Antelope Valley on which it planned to construct the Twin Cities Bowl. L.A. Land obtained necessary permits and commissioned engineering and architectural plans for construction. RT Vol. 2 at 349-352, 391-392. L.A. Land placed an equipment order with Brunswick totaling over one million dollars. Ex. 1000A-2.

As the court of appeals recognized, it is difficult to procure financing for bowling equipment. App. 11a. For this reason, Brunswick had worked out an arrangement with Deutsche Credit Corporation ("Deutsche") whereby Deutsche agreed to extend credit to Brunswick's bowling equipment customers under certain conditions. For example, Deutsche required that loan applicants like L.A. Land submit their paperwork to *Brunswick*, rather than directly to Deutsche, that Brunswick forward all loan materials to Deutsche, and that Brunswick send Deutsche a market survey regarding the prospective bowling center for which the equipment was ordered. *Id.* at 3a. When L.A. Land ordered equipment from Brunswick, it sought equipment financing from Deutsche. *Id.*

Deutsche was one of the very few lenders, if not the only lender, that would even consider extending credit for bowling equipment purchases in the relevant market during the relevant period. RT Vol. 2 at 390-391; Vol. 3 at 457-459; Vol. 4-B at 719-721; McMaster Deposition ("Dep.") at 135-137 (RT Vol. 5 at 824). Its special arrangement with Brunswick had the effect of giving

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[2] The only other source of even an arguably complete integrated package of bowling equipment was American Machine Foundry ("AMF"), and during the period relevant to the present case, AMF's continued viability was in doubt. The industry was uncertain whether AMF would be able to deliver products in a timely manner, provide service and spare parts, and honor its warranties. RT Vol. 2 at 242-243, 368-369; Vol. 7 at 989-991.

Brunswick veto power—as a gatekeeper—over the most likely financing source for the purchase of bowling equipment.

Despite the apparent willingness of its bowling products division to sell L.A. Land the equipment it needed to operate the Twin Cities Bowl, Brunswick as a whole was really working behind the scenes to prevent L.A. Land's entry into the market. The jury found, and the Ninth Circuit accepted, that Brunswick committed "anticompetitive" acts to keep L.A. Land out of the market. App. 9a-10a, 11a, 27a. Specifically: (1) Brunswick convinced L.A. Land's construction company not to build the Twin Cities Bowl (*id.* at 10a); (2) Brunswick delayed the Twin Cities Bowl project by failing to transmit L.A. Land's financial information to Deutsche for an unduly long period (*id.*; RT Vol. 3 at 438-442), thus securing a headstart for its own new bowling center in the Antelope Valley; and (3) Brunswick prevented L.A. Land from obtaining bowling equipment financing from Deutsche and from any other potential lender by preparing a misleading survey which stated that there was not enough potential business in the market for the Twin Cities Bowl if Brunswick also decided to build there. App. 10a; McMaster Dep. at 18, 75-76 (RT Vol. 5 at 824); Ex. 25; Ex. 45.

When Deutsche rejected L.A. Land's delayed loan application, after receiving Brunswick's misleading market survey, L.A. Land attempted to secure financing from numerous other lenders, but to no avail. As noted, very few lenders would finance the purchase of bowling equipment in the first place, and Brunswick's market survey and Deutsche's prior rejection scared off any who might have. RT Vol. 2 at 390-391; Vol. 3 at 457-459; Vol. 4-B at 719-721; McMaster Dep. at 137 (RT Vol. 5 at 824); Ex. 25 at 2.

While delaying and ultimately preventing L.A. Land's entry, Brunswick expedited the construction of its own additional bowling center in the relevant market. Bruns-

wick's market survey had represented that there was sufficient population for only one additional bowling center in the market. Ex. 45. Whether this representation was technically true or deliberately misleading when originally made in the market survey, it became a self-fulfilling prophecy because no lender would extend credit to an entity in the face of Brunswick's adverse survey. McMaster Dep. at 18, 75-76 (RT Vol. 5 at 824); Ex. 25 at 2. Accordingly, Brunswick succeeded not only in keeping L.A. Land out of the market, but also in ensuring for the foreseeable future that no one else could enter the market and threaten its 100% market share there, precisely as it had intended. Ex. 433. To this day, Brunswick owns the only two bowling centers in the relevant market.

2. *Litigation in the District Court.*

L.A. Land brought suit in the United States District Court for the Central District of California, charging Brunswick, *inter alia,* with monopolizing retail bowling services in the relevant market in violation of Section 2 of the Sherman Act and with intentional interference with prospective economic advantage. After a nearly six week trial, the jury found that Brunswick had violated Section 2 of the Sherman Act. Specifically, the jury concluded—under instructions that were not objected to by Brunswick and that therefore must be presumed to be correct—that Brunswick possessed monopoly power in the relevant market, willfully maintained that power through restrictive or exclusionary conduct, affected interstate commerce, and injured L.A. Land's business interests as a result. App. 27a. The jury also found that Brunswick had committed a number of torts in the process. *Id.* at 28a-29a, 31a-32a. Judge Pfaelzer denied post-trial motions on the federal claim [3] and entered an amended judgment award-

[3] After the jury's verdict, Brunswick moved for judgment notwithstanding the verdict. The district court granted the motion as to the state law claims for breach of contract and wrongful denial of contract, but denied the motion as to the antitrust and intentional interference claims. App. 20a-21a.

ing L.A. Land the trebled sum of $15,168,000 in damages on its antitrust claim or, alternatively, $5,056,000 on its claim for intentional interference, and costs and attorneys' fees. *Id.* at 23a-24a. Brunswick appealed.

3. ***The Ninth Circuit Opinion.***

The Ninth Circuit assumed, as it was required to, that Brunswick controlled 100% of the relevant market (App. 2a, 6a), that Brunswick took anticompetitive actions to keep L.A. Land out of the relevant market (*id.* at 10a), and that "the jury was entitled to find that bowling equipment financing is hard to obtain." *Id.* at 11a. Nevertheless, the appellate court reversed the jury's verdict on the ground that Brunswick, as a matter of law, could not possess monopoly power. *Id.* at 6a, 19a.

The court found that "the record simply does not support a finding that Brunswick had power to control prices or exclude competition," the test for monopoly power under this Court's controlling case of *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). App. 6a. The court below justified this conclusion on the ground that barriers to entry into the relevant market did not exist.

Specifically, the Ninth Circuit found that the "jury could not rationally construe" the fact that bowling equipment financing is difficult to obtain as a barrier to entry because "there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms." *Id.* at 11a. "The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents." *Id.* Thus, the Ninth Circuit concluded that a barrier to entry does not exist unless it imposes higher costs on new entrants than on incumbents.

In addition, the court below held that "the district court should not have sent" the case to the jury because "a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market." *Id.* at 12a-13a. In essence, the court ruled that the plaintiff was required to prove monopoly power in at least two markets in order to support a monopolization claim in one of them.

REASONS FOR GRANTING THE PETITION

1. The concept of entry barriers has taken center stage in antitrust litigation in recent years. If barriers are low, the existence of potential entrants can discipline incumbent firms and prevent even entities with high market shares from exercising monopoly power and setting prices above competitive levels. Accordingly, proof of low barriers can defeat the normal inferences of monopoly power, or threatened monopoly power, that can be drawn from high market shares in Sherman Act monopolization cases and Clayton Act Section 7 merger cases.

Unfortunately, the increasing importance of entry barriers in antitrust jurisprudence has been accompanied by increasing confusion about what constitutes entry barriers and who bears the burden of proving or disproving them, especially in cases like the present one where a defendant possesses an overwhelming percentage of the market.[4]

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[4] Authority is split on whether antitrust plaintiffs or defendants bear the burden of introducing evidence on barriers to entry. *Cf. United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990) (when the government introduces evidence of defendants' high market shares in Section 7 (15 U.S.C. § 18) cases, burden shifts to defendants to introduce evidence, such as low entry barriers, to rebut presumption of unlawfulness), *with Nelson* v. *Monroe Regional Medical Center*, 925 F.2d 1555, 1573 (7th Cir.), *cert. denied*, 112 S. Ct. 285 (1991) (Pell, J., concurring in part and dissenting in part) (in Section 2 cases, the burden is on plaintiff to show the existence of barriers to entry); *Rebel Oil Co.* v. *At-*

This case presents the Court with a unique opportunity to clear up the confusion surrounding this increasingly important antitrust concept for a number of reasons. First, there is no complex factual dispute here about whether or not entry into the relevant market is difficult. The Ninth Circuit assumed entry was difficult because capital was hard to obtain and, in fact, Brunswick's exploitation of this situation successfully preserved its total monopoly.

Second, the Ninth Circuit wholly ignored evidence, which the jury could credit, that demonstrates classic structural barriers to entry. As demonstrated below, Brunswick claimed, and lenders believed, that the relevant market was saturated once Brunswick built its second bowling center there. Consequently, it was impossible for any potential newcomers to secure equipment loans to enter this particular market. The Ninth Circuit did not even consider these facts when it concluded that no jury could reasonably find entry barriers in the relevant market.

Third, the Ninth Circuit's conclusion that difficulty in obtaining financing is not a barrier in the legal sense—because it does not impose differential burdens on incumbents and new entrants—is plainly wrong and undercuts the purpose for examining entry barriers in the first place. The issue is whether barriers are low enough for potential new entrants effectively to dissuade the incumbent monopolist from charging supracompetitive prices. It is irrelevant whether or not the incumbent itself faced the same barriers in the past when it entered the market.

Finally, the Ninth Circuit's implicit finding that there are no effective barriers to entry unless the monopolist also monopolizes the upstream supplier market effectively

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lantic Richfield Co., 133 F.R.D. 41, 44-45 (D. Nev. 1990) (same). This dispute is not material to the present case, however, because there was credible evidence of entry barriers since the jury "was entitled to find that bowling equipment financing is hard to obtain." App. 11a.

makes it impossible for a plaintiff ever to prove monopoly power. If the court's logic were accepted, the plaintiff could not prove monopoly power in the first upstream market without proving monopoly power in the market for supplies to suppliers, and so on up the line. A plaintiff's or prosecutor's burden could become virtually insurmountable in monopolization or merger cases.

2. This case also presents the Court with the opportunity to clarify the appropriate roles of judge and jury in antitrust disputes. Confusion now exists because of the potentially conflicting instructions that lower courts can glean from language in three recent cases from this Court —*Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). *Kodak* instructed that juries should be permitted to determine whether monopoly power is present on the basis of specific facts, rather than abstract economic theories. *Matsushita* and *Brooke* directed that certain antitrust claims should be dismissed as a matter of law if they made no economic sense. This case adds to the confusion surrounding these seemingly conflicting instructions.

I. THE NINTH CIRCUIT DECISION EXACERBATES THE CONFUSION OVER THE SIGNIFICANCE OF POTENTIAL ENTRY IN ANTITRUST CASES.

A. The Entry Issue Is Important for Antitrust Enforcement.

The unlawful monopolization offense under Section 2 of the Sherman Act requires proof of the following elements: (1) defendant's possession of monopoly power in the relevant market; (2) defendant's willful acquisition or maintenance of that power; and (3) the existence of anti-

trust injury. App. 5a. Only the first element, Brunswick's possession of monopoly power in the relevant market, was at issue in the Ninth Circuit's decision.

Monopoly power is " 'the power to control prices or exclude competition.' " *Id.* at 6a (citing *E.I. duPont de Nemours & Co.*, 351 U.S. at 391). This Court and others have traditionally used market share as a proxy for monopoly power and have inferred monopoly power from a "predominant share of the market." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).[5] This inference of monopoly power can, however, sometimes be rebutted by a showing of low entry barriers or other significant restraints on a purported monopolist's power in the marketplace. *See, e.g., Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, 366-367 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).[6] This is be-

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[5] *See, e.g., Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) ("Market power is 'normally inferred from the possession of a substantial percentage of the sales in a market' ") (citation omitted); *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 980, 1000 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) ("Monopoly power is . . . ordinarily inferred from a predominant share of the market"); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (" 'size is of course an earmark of monopoly power' ") (citation omitted); *Energex Lighting Industries* v. *North American Philips Lighting Corp.*, 765 F. Supp. 93, 101 (S.D.N.Y. 1991) ("The strongest evidence of market power is the market share which defendant possesses of the relevant market"); *American Standard, Inc.* v. *Bendix Corp.*, 487 F. Supp. 265, 269 (W.D. Mo. 1980) ("The existence of monopoly power may be inferred from the relative dominance of the particular firm in the particular industry"). *Cf. R.C. Bigelow, Inc.* v. *Unilever* N. V., 867 F.2d 102, 108 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) (84% of market is *prima facie* evidence of monopoly power).

[6] *Cf. United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278, 1285-86 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990) ("The defend-

cause "where entry is extremely easy . . . the threat of such entry should prevent [the alleged monopolist] from raising prices to monopoly levels or the fact of such entry should make any exercise of monopoly power short lived." ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) (hereafter "*Antitrust Law Devs.*") at 217.

United States v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), is perhaps the most significant recent case holding that evidence of a high market share can be rebutted by other factors, and it was accepted as controlling by the court below. But *Syufy* provides no support for the lower court's decision. The *Syufy* court held that a fact finder is *not required* to find monopoly power simply because market shares are high in a market where "there are *no* barriers to entry." *Id.* at 661 (emphasis added). *Syufy* also involved a market where the supposed victims of defendant's monopoly had strong bargaining power of their own, and affirmatively disclaimed any harm. *Syufy*, 903 F.2d at 669-670.

Here, the court accepted—as it had to—that Brunswick possessed 100% of a relevant market in which entry was difficult and that Brunswick's anticompetitive actions successfully preserved its monopoly. It goes beyond *Syufy* and other existing case law even to *permit* a fact finder to avoid a finding of monopoly power in this situation, but the court below did something even more drastic. It held that the jury was *prohibited* from finding monopoly power as a matter of law. The court's extraordinary hold-

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ants' immense shares in a reasonably defined market create a presumption of illegality . . . . [O]nce the government showed that the merger would create a firm having a market share approaching, perhaps exceeding, a common threshold of monoply power—two-thirds [citation omitted]—it behooved the defendants to present evidence that the normal inference to be drawn from such a market share would mislead"); *McCaw Personal Communications, Inc.* v. *Pacific Telesis Group*, 645 F. Supp. 1166, 1173-74 (N.D. Cal. 1986) (the combined market shares of defendants render the acquisition presumptively illegal but the illegality may be rebutted by "[t]he existence of low barriers to entry").

ing resulted from its misunderstanding of theoretical economic concepts and entry barriers. This misuse of entry analysis to overturn a jury verdict does not merely affect an esoteric corner of antitrust law; it cuts out the heart of antitrust enforcement.

The reason is that entry arguments, if uncritically accepted, can be used to defeat any antitrust claim. They could make all antitrust laws unnecessary, because it always can be argued that new entry into existing markets, or the development of new substitute products, will sooner or later erode the power of any monopoly or of any combination. Uncritical acceptance of entry arguments would defeat a monopolization claim, as in this case; it would also defeat attempted monopolization claims because a plaintiff could not prove the requisite likelihood that anticompetitive conduct would ever succeed; it would defeat claims under the Robinson-Patman Act (15 U.S.C. § 13) because no one could prove a potential for competitive harm; and it would even undercut the rationale for a *per se* prohibition of price fixing, because entry could also theoretically discipline an illegal conspiracy. This extreme view that entry, however defined, ultimately cures everything has never been accepted, as a matter of law or policy, and yet it is the basis of the decision below.

Recent experience with administration of the antimerger provisions of the Clayton Act demonstrates how loose entry analysis can swallow substantive antitrust law. In fact, concerns about uncritical acceptance of entry arguments prompted the federal antitrust agencies to treat the subject in detail in their new Merger Guidelines. Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, *reprinted in* 57 Fed. Reg. 41552-63 (Sept. 10, 1992). *Cf.* Horizontal Merger Guidelines of the National Association of Attorneys General, *reprinted in* 64 Antitrust & Trade Regulation Reporter (Supp. Apr. 1, 1993) at § 5. Specifically, the Government no longer concludes that normal market share presumptions can be overcome by

evidence that potential entry *could* occur. Instead, the Government examines whether entry actually *would* occur and whether it would deter supracompetitive pricing. Commentary to 1992 Merger Guidelines, *Antitrust Law Devs.* at 1361-62. The analysis of entry in the opinion below is directly contrary to this policy.

This Court has never spoken on the appropriate definition of entry barriers. To promote consistency among and within the circuits, to foster antitrust enforcement by making results more predictable, and to streamline costly and complex antitrust discovery, it is crucial that the Court provide guidance about the appropriate contours of the entry barrier concept. The Ninth Circuit's flawed approach to entry barriers provides an ideal opportunity for the Court to do so, because the relevant facts are undisputed, and the Court of Appeals assumed those facts to be true for purposes of its decision.

In summary, the approach of the court below—if followed—will seriously cripple antitrust enforcement. It is hard to imagine a stronger showing of monopoly power than the one made in this case. The defendant had a total monopoly and was actually able to exploit existing barriers to bar entry by a likely competitor now and for the foreseeable future. If mere speculation about possible entry defeats a jury verdict in this situation, few if any claims are likely to survive, contrary to the long-standing Congressional policy embodied in the Sherman Act.

B. The Lower Court Simply Assumed Entry Was Easy Because of a Narrow and Unrealistic Definition of Entry Barriers.

Along with Brunswick's conceded 100% market share, there was clear proof of entry barriers in this case. The Brunswick market survey demanded by lenders stated that there was room for only one additional 40-lane bowling center in the relevant market. While L.A. Land demonstrated, and the court of appeals assumed, that this survey was "false or misleading," it makes no differ-

ence for the purpose of dealing with barriers to entry whether the survey was false or not. The survey became a self-fulfilling prophecy because no lender would extend credit to equip a new bowling center in an area that, according to a Brunswick survey, could not support that bowling center. The result was what is known as a "thin" market—a market in which only limited entry can be absorbed. *See, e.g., Union Leader Corp.* v. *Newspapers of New England Inc.*, 284 F.2d 582, 583-584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). This in itself constituted an entry barrier.[7] *Antitrust Law Devs.* at 217.

Thus, when Brunswick engaged in anticompetitive behavior, it did so in a thin market—a market in which barriers to entry *already* existed. And it therefore did so illegally. Even more important, the entry barrier was not one that affected L.A. Lane alone. *Every* putative builder of a bowling center was faced with the same forecast in the same survey in the same thin market. Indeed, the market survey did not even mention L.A. Land. The harm was to competition generally, and not just to a single competitor.

Other facts in the record likewise suggested the existence of entry barriers. As the court below acknowledged, "[t]here is some evidence in the record that lenders generally have trepidations about financing bowling equipment purchases" and "the jury was entitled to find that bowling equipment financing is hard to obtain." App. 11a. The Ninth Circuit held as a matter of law, however, that these facts could not constitute a barrier to entry because (1) there was no showing that it was harder (or more expensive) for L.A. Land to get money than it

[7] The court conceded that "[e]conomies of scale" could be a barrier to entry. App. 11a at n.4. However, the court never considered whether the thin market in the Antelope Valley—created by Brunswick's market survey, if it did not already exist—had exactly the same preclusive effect as scale economies would have had.

was for Brunswick (*id.*), and (2) Brunswick could not inhibit entry into the bowling center market, according to the court, unless it had monopoly power in the upstream bowling equipment market. *Id.* at 12a-14a. Neither of these grounds withstands scrutiny.

1. *The Requirement of Differential Barriers.*

There was, in fact, evidence that would support the jury's verdict even under this overly narrow standard for entry barriers. Brunswick's unique arrangement with one of the very few sources of bowling equipment financing—Deutsche—created a clear strategic advantage. App. 3a. In addition, this arrangement effectively gave the gatekeeper, Brunswick, veto power in any dealings between L.A. Land and the most likely, if not only, source of equipment financing. In light of Brunswick's "false or misleading" market survey for the Antelope Valley, timing was critical. Brunswick's delay in processing and transmitting L.A. Land's loan application enabled Brunswick to occupy the market first. *Id.* at 3a-4a. The Ninth Circuit's failure to consider these decisive events is a prime example of how error arises in antitrust litigation when abstract economic theories are allowed to trump specific facts.[8]

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[8] Moreover, other facts in the record also signaled the existence of entry barriers. For example, the record established that by 1988 all participants in the relevant market, except for Brunswick, had exited, and no one had successfully entered the market for many years. App. 7a. There is ample authority holding that the jury could rely on these facts alone to show the existence of entry barriers and Brunswick's monopoly power. *See, e.g., Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 971 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) ("While it is true that only capital and licensing were necessary to initially enter the health care financing market, the fact remains that no other entrant remotely approached Blue Cross' domination of the market. That evidence cuts against the argument that entry barriers were insubstantial"); *Oahu Gas Service, Inc.*, 838 F.2d at 366-367 (the failure of other firms to enter the market could support an inference that defendant

More importantly, however, the Ninth Circuit's requirement that a differential entry burden be shown is erroneous as a matter of law. This requirement ignores the basic rationale for consideration of entry barriers in the first place. The underlying concern in cases where monopoly power is at issue is whether or not an existing monopolist's ability to exploit its position will be disciplined by the potential for new entry. The disciplining effect of new entry will obviously be less potent if there are barriers that make it difficult for new competitors to get into the business. For this purpose, it is entirely irrelevant that the incumbent might also have had to overcome barriers in the past. The incumbent still has monopoly power (*i.e.*, power over prices) if there are entry impediments to newcomers.[9] *Cf. Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 120 n.15 (1986) ("In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm has eliminated some of its rivals . . .") (emphasis in original).

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had the power to exclude competitors or control price without much detailed inquiry); *Federal Trade Commission* v. *Rhinechem Corp.*, 459 F. Supp. 785, 789-790 (N.D. Ill. 1978) ("The testimony is unanimous regarding the barriers to entry in the organic pigments industry. Not one firm has made a successful *de novo* entry in this market in the last twenty years"); *Antitrust Law Devs.* at 218. *Cf. Energex Lighting Industries*, 765 F. Supp. at 97 (entry of new firms indicates that the market was not saturated and barriers to entry did not exist).

[9] Ironically, the Ninth Circuit earlier rejected evidence of Brunswick's " 'systematic campaign to exclude competitors' " as a demonstration of entry barriers precisely because "anticompetitive conduct by one firm against another is not an 'entry barrier'." App. 11a. Once again the court misconstrued and misapplied the entry barrier concept. While barriers need not be erected by the monopolist to qualify as entry barriers, they certainly may be. *See, e.g.*, William G. Shepherd, *The Economics of Industrial Organization* (3d ed. 1990) at 273-274; Richard A. Givens, *Antitrust: An Economic Approach* § 3-10 at 13 (1989 Supp.).

The Ninth Circuit's chosen definition of entry barriers is far too restrictive.[10] "*Any* market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry . . . ." *Southern Pacific Communications*, 740 F.2d at 1001 (emphasis supplied). *See also Reazin*, 899 F.2d at 968. These difficulties "deter entry while permitting incumbent firms to earn monopoly returns." Phillip A. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 409 at 525 (1993 Supp.)[11]

2. *The Requirement That Monoply Power Be Proved in Two Different Markets.*

The Ninth Circuit elevated an economic "presumption" —namely, that a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market (App. 12a-14a)—over the jury's specific findings of fact. Although the lower court does not expressly link this presumption to the issue of entry barriers, it implicitly flows out of the same con-

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[10] The Ninth Circuit's "support" for its restrictive application of the entry concept is inapposite. It cited one case which did not even mention or allude to the restrictive application—*Morgan, Strand, Wheeler & Biggs* v. *Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991)—and two isolated statements by Professors Areeda and Turner in which higher entry costs for new entrants than incumbents were termed entry barriers. App. 11a-12a & n.4 (citing 2 Areeda & Turner, *Antitrust Law* ¶ 409b and ¶ 409e (1978)). L.A. Land has no quarrel with this latter proposition. Just because differential entry costs may constitute entry barriers, however, does not mean that they are the only costs or conditions that ever do.

[11] The Ninth Circuit did acknowledge early in its decision that an entry barrier could be " 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns'." App. 11a (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-510 (1992 Supp.)). Inexplicably, however, it ignored this definition when it evaluated whether the difficulty of obtaining financing could constitute a barrier to entry.

ceptual error by the court. The presumption is also contrary to existing law and elementary logic.[12]

Existing law does not require a plaintiff who claims monopoly in one market to prove that the defendant also monopolizes an upstream or affiliated market. In fact, this Court's recent *Kodak* case is squarely to the contrary, as are all other cases which find monopoly power in a retail market without proof of integration into and monopoly power in an upstream market. *Cf. United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) (merger of two retail grocery chains violated Section 7 without concern for who made and sold the food to the chains).

The requirement is also logically unsound. If monopoly power in bowling centers cannot exist without monopoly power in bowling equipment, then, by the same token, monopoly power in bowling equipment cannot exist without monopoly power in the component parts of bowling equipment. By extension of the Ninth Circuit's logic, a Section 2 plaintiff presumably could never prevail unless it proved that defendant possessed monopoly power over a chain of upstream markets. Monopolists who participate only in downstream or retail markets would then never be subject to Section 2's prohibition against unlawful monopolization, or indeed to any other antitrust laws which require proof of competitive impact.

The apparent source of the Ninth Circuit's erroneous presumption is once again its misunderstanding of the

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[12] The court's invocation of its "presumption" is also unfair on process grounds. The lower court stated that L.A. Land "specifically eschewed a supply monopoly theory; consequently it was precluded from obtaining discovery on that theory." App. 12a. On the contrary, Brunswick moved early on to *prevent* discovery about its market power in the equipment market, claiming it was irrelevant, and the district court, against L.A. Land's objection, granted Brunswick's motion. RT Vol. 12 at 1843-45. It is patently unfair to fault L.A. Land for not presenting evidence on Brunswick's market power in the upstream market when the district court, at Brunswick's urging, had held that such evidence was not discoverable.

entry barrier concept. The court overturned a well-instructed jury's finding of monopoly power and concluded that Brunswick could not possess such power in the relevant market unless it also possessed it in an upstream market—and could, therefore, exclude competition, or erect entry barriers, itself. The law, however, does not confine entry barriers to barriers actually erected by the monopolist.[13] The Ninth Circuit's mistaken reasoning is yet another example of the confusion which currently clouds application of the entry barrier concept in antitrust law.

II. THE NINTH CIRCUIT DECISION ADDS TO THE EXISTING CONFUSION OVER THE APPROPRIATE ROLES OF JUDGE AND JURY IN ANTITRUST CASES.

As the Ninth Circuit's decision demonstrates, courts continue to be confused about the appropriate roles of judges and juries in antitrust litigation. It is important to clear up this confusion because antitrust litigation consumes significant public and private resources. There is waste and injustice both when jury verdicts approved by district courts are improperly overturned (as here) and

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[13] *See, e.g., Oahu Gas Service, Inc.*, 838 F.2d at 366-367 (defendant could lack the power to exclude competitors, but external factors could still preclude entry into the market); *Southern Pacific Communications Co.*, 740 F.2d at 1001 ("The defendant's innocence or blameworthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry"); *Automotive Products, PLC* v. *Tilton Engineering, Inc.*, 1993 U.S. Dist. LEXIS 3752, at *20 (C.D. Cal Jan. 21, 1993) (there are two kinds of barriers to entry—"(1) structural barriers, such as where the entry cost of entering a particular market is very high . . .; and (2) barriers created by the monopolist himself to keep out competitors"); *Ortho Diagnostic Systems* v. *Abbott Laboratories*, 822 F. Supp. 145, 148 (S.D.N.Y. 1993) (description of entry barriers includes external factors such as "high costs of research and development, and the expense of acquiring patents, maintaining a large sales and technical support staff and obtaining FDA approvals").

when cases are improperly submitted to the jury in the first place.

The confusion arises because the language in *Kodak*, 112 S. Ct. 2072, on the one hand, and *Matsushita*, 475 U.S. 574, and *Brooke*, 113 S. Ct. 2578, on the other, seems to send conflicting signals to the lower courts. *See, e.g., Leading Cases*, 106 Harv. L. Rev. 163, 328 (1992) (judicial tolerance of summary judgment in antitrust cases and willingness to rely on theoretical antitrust propositions "suffered unexpected reversals" in *Kodak*, and lower courts are left "with little guidance and American industries with much uncertainty"); Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 Antitrust L. J. 327, 393-394 (1994); Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 Md. L. Rev. 336, 360-361 (1993); Neal R. Stoll and Shepard Goldfein, "Kodak": *A Barrier Against Naked Economic Theory*, N.Y. L.J., June 16, 1992, at 3, 7. *Kodak* instructs courts not to elevate economic theory over fact, and to permit fact finders to determine the presence of monopoly power based on the " 'particular facts disclosed by the record.' " *Kodak*, 112 S. Ct. at 2082 (citation omitted). *Matsushita* and *Brooke*, on the other hand, instruct courts to dismiss as a matter of law certain antitrust claims which make no economic sense.

Properly understood and read in context, *Kodak*, *Matsushita*, and *Brooke* are not inconsistent. *Matsushita* and *Brooke* did not rely on the kind of esoteric economic theory condemned by *Kodak*. Instead, they rested on the common-sense observation that defendants do not engage in *predatory pricing* unless there is a reasonable likelihood that short-term losses will be recouped through long-term gains. If there is no reasonable likelihood of that happening—as in *Matsushita* and *Brooke*—a plaintiff's verdict cannot stand as a matter of law.

Kodak and this case are different. They are not predatory pricing cases; they involve other types of conduct. A finding for defendants as a matter of law in this situation, as occurred below, requires a court to take judicial notice of controversial economic theories not grounded in particular facts or simple common sense. *Kodak* condemned the elevation of such theories over actual facts. The Ninth Circuit nevertheless did precisely that.

Specifically, the Ninth Circuit held that L.A. Land's case should not have gone to the jury because "a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market." App. 13a. The Ninth Circuit elevated this legal "presumption" over a well-instructed jury's express finding that Brunswick did in fact possess monopoly power in the relevant market.[14] The lower court also misapplied economic theory when it concluded that there could not be any barriers to entry unless potential entrants faced higher hurdles than the incumbent monopolist.

The Ninth Circuit's erroneous opinion presents this Court with a timely and straightforward opportunity to rectify existing confusion over the seemingly conflicting signals in *Kodak*, *Matsushita*, and *Brooke*, about the appropriate roles of judge and jury in antitrust litigation.

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[14] It is significant that Brunswick never objected to the jury instructions on monopoly power. App. 7a at n.2. Indeed, the district court's relevant monopoly power instructions largely mirrored the sample antitrust jury instructions published by the Antitrust Law Section of the American Bar Association. *See* Section of Antitrust Law, American Bar Association, *Sample Jury Instructions in Civil Antitrust Cases* (1990 ed.) at C-4—C-5, C-14—C-19.

III. THE ISSUES ARE IMPORTANT AND RECURRING.

The two questions presented for review in this case have enormous impact for antitrust law and for the future of competition. The Ninth Circuit has overturned a jury verdict and held that a company *cannot* be liable for monopolization, even though the company possesses 100% of the relevant market, will continue to do so for the foreseeable future, and misuses its power to defeat entry in a market where barriers to entry are already high. This result was not based on erroneous jury instructions; the instructions in this case were agreed to by the defendant.

Instead, the lower court took judicial notice that it is not possible to monopolize the bowling market because entry is easy. The court simply assumed entry is easy because of its mistaken notion that a plaintiff must prove that entry barriers impose differential burdens on potential new entrants and incumbents, and because of its mistaken notion that a plaintiff must prove monopoly power in an entirely different, upstream market.

Such a ruling, if allowed to stand, could have a devastating effect on existing public and private incentives to enforce the antitrust laws. As indicated above, it would have an immediate effect on monopolization and attempted monopolization cases, and would also undermine enforcement of the anti-merger law and perhaps even the *per se* strictures against horizontal conspiracies.

CONCLUSION

For each and all of the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-55134

LOS ANGELES LAND CO.; SIERRA PALM PARTNERS; WEST LANES INC.,
Plaintiff-Appellees,

v.

BRUNSWICK CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted July 12, 1993

Decided Oct. 13, 1993

Stephen M. Shapiro, Mayer, Brown & Platt, Washington, DC, for defendant-appellant.

Eliot G. Disner, Shapiro, Posell & Close, Los Angeles, CA, for plaintiff-appellee.

Before: Floyd R. GIBSON,* HALL and KLEINFELD, Circuit Judges.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Brunswick Corporation ("Brunswick") appeals from the district court's judgment following a jury verdict awarding to Los Angeles Land Company ("L.A. Land") $15,168,000 under section 2 of the Sherman Act, and, alternatively, one-third that amount under California common law governing tortious interference with prospective economic advantage. Brunswick contends that the district court should have granted its motions for directed verdict and judgment notwithstanding the verdict because L.A. Land failed to prove violations of federal antitrust law or state tort law. This case centers on the competing efforts of the two parties to build a bowling center in Palmdale in the Antelope Valley (a portion of Los Angeles County) at a time when Brunswick owned the only existing center in the Valley.

The district court had jurisdiction over the federal antitrust claims under 15 U.S.C. §§ 15, 26, and pendent jurisdiction over the state law claims. We have jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. We reverse.

I. FACTS AND PROCEEDINGS BELOW

Brunswick wholly owns two subsidiaries—one which manufactures and sells bowling equipment, and another which owns and operates bowling centers in the United States and abroad. One of the centers under the control of the latter subsidiary is the Sands Bowl in the Antelope Valley. In spring of 1988, the Sands Bowl was the only bowling center in the Antelope Valley, an area with a rapidly expanding population.

L.A. Land is a real estate development company which, among various other enterprises, owns and operates three bowling centers in Southern California. In 1987, L.A. Land set in motion a plan to build a bowling center in the Antelope Valley. In April 1988, it sent an order for equipment to Brunswick, with specified condi-

tions. About that time, Brunswick itself developed an interest in opening a new bowling center in the Antelope Valley.

In 1986, Brunswick had formed an agreement with Deutsche Credit Corporation ("DCC") under which Brunswick helped its customers to obtain equipment financing from DCC by guaranteeing through a contingent repurchase arrangement that Brunswick rather than DCC would bear most of the risk of borrower default. The agreement required Brunswick to assume contingent liability for the loan, gather information for the loan application package and transmit the package to DCC, and prepare a market survey to help DCC assess the viability of any new bowling center. When L.A. Land sought to purchase equipment from Brunswick for its proposed Antelope Valley center, it also sought equipment financing from DCC. However, DCC refused to accept a loan application directly from L.A. Land and instead directed it to process the application through Brunswick. L.A. Land began attempting to arrange the financing through Brunswick sometime about April 1988.

Previous to the key events at issue in this case, L.A. Land opened a bowling center in San Dimas, California. It purchased the equipment for that center from Brunswick, financed the purchase through DCC, and contracted with Timberlake Construction Company ("Timberlake") to build the center. L.A. Land asked Timberlake to build its proposed center in the Antelope Valley, but Timberlake declined, citing a policy of not building in Brunswick market areas (i.e., areas where Brunswick owned and operated bowling centers.) As of 1988, Timberlake had for some time built all of Brunswick's new U.S. bowling centers.

By August of 1988 (and possibly earlier), Brunswick decided to go ahead with plans to build a new bowling center in the Antelope Valley. Brunswick had forwarded L.A. Land's equipment financing application to DCC at the end of July 1988. L.A. Land alleges that Brunswick

delayed transmittal of the application so that Brunswick could get a head start on the construction of its own new bowling center in the Antelope Valley. Ultimately, DCC turned down L.A. Land's financing application, Brunswick built a new bowling center in the Antelope Valley, and L.A. Land did not.

L.A. Land commenced this action on August 30, 1988, and immediately requested a temporary restraining order to enjoin Brunswick's construction of its new center arguing that "the market can adequately bear just one more bowling center"; the district court denied the request. At trial, L.A. Land contended that Brunswick committed three acts which violated federal antitrust law and constituted torts under California law: (1) Brunswick delayed transmission of L.A. Land's financial information to DCC; (2) Brunswick submitted to DCC an inaccurate market survey; and (3) Brunswick restricted Timberlake from building a bowling center in the Antelope Valley for L.A. Land.

Brunswick moved for a directed verdict after L.A. Land presented its case in chief and at the end of trial. The district court denied those motions and sent the case to the jury, which rendered a verdict in favor of L.A. Land. The court also denied Brunswick's motion for judgment notwithstanding the verdict, and entered a judgment awarding L.A. Land the trebled sum of $15,168,000 on the antitrust claim or, alternatively, $5,056,000 on the tort claim, and $1,435,974.80 in attorneys' fees and costs. This appeal of that judgment followed.

II. STANDARD OF REVIEW

The standard for determining the propriety of a directed verdict or a judgment notwithstanding the verdict is the same for district and appellate courts: "whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the

nonmoving party." *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 992 (9th Cir.1986) (internal quotation omitted), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation omitted).

In deciding this appeal from the denial of motions for directed verdict and judgment notwithstanding the verdict, we "review the evidence on [the] factual issues in the light most favorable to [L.A. Land] and draw all reasonable inferences in its favor." *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 364 (9th Cir.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). The question whether a party possesses monopoly power is essentially one of fact. *Id.* at 363. However, the question whether specific conduct is anticompetitive in violation of the Sherman Act is one of law which we therefore review de novo. *Id.* at 368. Likewise, we review de novo the question whether specific conduct constitutes a tort under California law. *Salve Regina College v. Russell*, 499 U.S. 225, 231-32, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991) (a court of appeals should review de novo a district court's determination of state law).

III. DISCUSSION

A. Antitrust Claim

In a nutshell, L.A. Land's antitrust theory is that Brunswick monopolized the market for retail bowling services in Palmdale, and committed three specific acts in order to exclude L.A. Land from that market and thereby maintain its monopoly. At trial, L.A. Land had to prove three elements in order to establish a Sherman Act § 2 violation on its theory: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.

Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992); *Universal Analytics v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1257 (9th Cir.1990). The relevant product and geographic markets were conclusively defined before trial as retail bowling services in the Antelope Valley and are not contested; otherwise, all three elements are disputed in this appeal.

We begin and end our inquiry with the question whether the record supports the jury's finding on the first element, i.e., that Brunswick possessed monopoly power in the relevant market.[1] We believe L.A. Land's whole antitrust claim founders on this issue. The definition of monopoly power is clearly established in the case law: "Monopoly power is the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). Viewing the evidence in the light most favorable to L.A. Land, the record simply does not support a finding that Brunswick had power to control prices or exclude competition.

Brunswick contends that, in order to prove monopoly power, L.A. Land relied solely on the fact that Brunswick owned the only existing retail bowling center in the Antelope Valley during the relevant time period. Brunswick argues that proof of its 100% market share does not demonstrate that it had the power to control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants. Case law supports this argument. *See Oahu*, 838 F.2d at 366 ("A high market share, though it may ordinarily raise

[1] L.A. Land contends that Brunswick failed to dispute the sufficiency of the evidence to support a finding of monopoly power in its motion for directed verdict, and therefore waived the right to raise this challenge on appeal. This contention is clearly spurious, as L.A. Land itself noted in court that Brunswick raised the question of market power in its argument on the directed verdict motion. R.T. at 1843.

an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (internal citation omitted); *United States v. Syufy Enters.*, 903 F.2d 659, 664 & n. 6, 671 (9th Cir.1990).

L.A. Land responds with several arguments. First, L.A. Land points out that the evidence presented to the jury showed that Brunswick's share of the relevant market increased over time until it reached 100%. Brunswick's market share increased because two competitors withdrew from the market. One bowling center closed in 1979 after a fire, and the other, a 10-lane bowling center in Lancaster, closed in Spring 1988. Neither case which L.A. Land cites supports its assertion that the jury could properly rely on this evidence of withdrawals from the market to infer that Brunswick possessed monopoly power.[2] One, *Oahu,* 838 F.2d at 366, does not discuss withdrawal; the other, *Greyhound Computer Corp. v. International Business Machines,* 559 F.2d 488, 497 (9th Cir.1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978), states that the fact that "[t]wo substantial competitors who met IBM in the marketplace . . . bowed out after sustaining heavy losses" helped support an inference of IBM's market dominance. In this case, however, L.A. Land does not suggest (and directs the court to no evidence which suggests) that the withdrawal of Brunswick's two competitors was in any way attributable to Brunswick's competitive conduct or any market conditions. Indeed, the evidence does not reveal any reason for their departures from the market,

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[2] The jury instruction concerning monopoly power, to which Brunswick apparently did not object, did permit the jury to consider the departure of companies from the market as an indication of Brunswick's monopoly power. However, on review of a denial of a JNOV motion, this court applies the law truly controlling the case, regardless of the jury instructions. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.,* 880 F.2d 176, 182-83 & n. 5 (9th Cir.1989), *cert. denied,* 493 U.S. 1058, 110 S.Ct. 868, 107 L.Ed.2d 952 (1990).

other than that one of the competitors chose not to reopen after a fire. Thus, we do not see how this evidence could support a finding of monopoly power.

Second, L.A. Land contends that the evidence showed that Brunswick charged monopoly prices. However, it points to no actual evidence of supracompetitive pricing, and the record reveals none. L.A. Land does point out that the prices Brunswick charged at the Sands Bowl (the single bowling center in the market before L.A. Land sought to enter) were "comparable" to prices Brunswick charged at bowling centers which were in better condition and which had automatic scorers. But L.A. Land cites no authority, and we are aware of none, which supports the notion that "comparable" prices may be considered supracompetitive, even considering some difference in quality.

The only other pricing evidence to which L.A. Land points concerns the fact that the average price [3] Brunswick charged at Vista Lanes (the bowling center it built in Palmdale after L.A. Land failed to enter the market) during the first 11 months of operation was higher than the prices it charged at any other center during that time. However, considering the record as a whole, this evidence does not support an inference of monopoly pricing. Testimony at trial, apparently uncontradicted, established that at least by the time of trial Vista's prices were lower than some and higher than others in the greater Los Angeles area, and indeed lower than the prices L.A. Land charged at its bowling center in San Dimas. Thus, the record does not support a conclusion that Brunswick had the power to control prices in the relevant market.

Third, L.A. Land asserts that the evidence established that Brunswick successfully excluded all competitors from the relevant market. We note that in order to prove

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[3] Average price is a composite of all the different prices charged in a bowling center and does not represent the actual price paid by any consumer.

Brunswick's possession of monopoly power, it was incumbent on L.A. Land to show that Brunswick had the power to exclude *competition* from the relevant market generally, not just to exclude a particular *competitor.* Courts have consistently confirmed that the goal of the antitrust laws is to protect competition rather than competitors. *See Spectrum Sports, Inc. v. McQuillan,* —— U.S. ——, ——, 113 S.Ct. 884, 892, 122 L.Ed.2d 247 (1993) (the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself"); *Syufy,* 903 F.2d at 668 ("It can't be said often enough that the antitrust laws protect competition, *not* competitors.") (emphasis in original); *Oahu,* 838 F.2d at 370 ("The goal of the antitrust laws . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919, 927 (9th Cir.1980) ("Of course, it is free and open competition that the Sherman Act protects, and not any right of one competitor to be free of rough treatment at the hands of another."), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). A key problem in this case is that rather than adducing evidence of Brunswick's ability to impair competition generally (such as evidence that Brunswick could prevent competitor access to necessary supplies from any provider), L.A. Land focussed primarily on proving particular anticompetitive acts. But a plaintiff can not establish a monopolization offense by a firm without market power solely on the basis of undesirable or even significantly anticompetitive behavior. 3 Areeda & Turner, *Antitrust Law* ¶ 810 at 296 (1978).

The only evidence of power to exclude competition to which L.A. Land directs our attention concerns particular anticompetitive acts aimed at Harold Gelber in 1985, and others aimed at L.A. Land itself. The latter acts are the subject of this litigation; though these acts

may arguably have been unjustifiable, it is not possible to ascertain whether they are related to the maintenance of monopoly power and therefore "exclusionary" in the antitrust sense without proof of market power. *See id.* ¶ 813 at 301. In other words, evidence of these acts does not prove power to exclude competition. Assuming without deciding that the record fully supports findings that, as L.A. Land sought to prove at trial, Brunswick prepared a false or misleading market survey, delayed transmittal to DCC of L.A. Land's financing application, and prevailed upon Timberlake not to contract with L.A. Land, these findings only support the conclusion that Brunswick committed anticompetitive acts. Whether those acts maintained a Brunswick monopoly is a question which logically requires some other proof of monopoly power. If this assessment were not correct then "possession of monopoly power" and "willful acquisition or maintenance of that power," *Pacific Express,* 959 F.2d at 817, would not be separate elements of a section 2 claim; rather, the latter would prove the former.

As to the Gelber evidence, even accepting L.A. Land's description of the evidence as accurate, it establishes no more than that Brunswick dissuaded Gelber from entering the market by threatening to compete (that is, by indicating that it intended to open a second bowling center in the market.) L.A. Land does not suggest that Brunswick set up any actual barriers to Gelber's entry into the market. *See Syufy,* 903 F.2d at 668 (a strong competitor's ability to deter entry by others is not a "structural barrier to entry"). Evidence of threatened competition can not rationally support an inference of power to exclude competition, particularly where a court has already determined that the acts in question were not exclusionary —Gelber brought an antitrust suit based on these events and lost. Thus, this evidence does not support a finding of monopoly power.

Finally, L.A. Land contends it proved that substantial barriers to entry existed in the relevant market. It argues

that evidence of "Brunswick's systematic campaign to exclude competitors, such as L.A. Land and Gelber" readily supports a jury finding of high barriers to entry. We reject this argument for the simple reason that anticompetitive conduct by one firm against another is not an "entry barrier." Barriers to entry may be defined as either "additional long-run costs that were not incurred by inincumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-10 (1992 Supp.) (internal quotation omitted).[4] The evidence of Brunswick's behavior toward L.A. Land and Gelber fits neither definition.

L.A. Land also argues that the difficulty of obtaining financing for a new center's bowling equipment is a barrier to entry. This is a more serious proposition. There is some evidence in the record that lenders generally have trepidations about financing bowling equipment purchases. Though there was also evidence that some 19 different lenders have financed purchases of Brunswick equipment since 1986, the jury was entitled to find that bowling equipment financing is hard to obtain. However, the jury could not rationally construe this factor as a barrier to entry, as there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms. *See* note 4. The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market dif-

[4] The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants. Economies of scale may also be considered an entry barrier in some situations. 2 Areeda & Turner, *Antitrust Law* ¶ 409b at 299-300 (1978). L.A. Land points to no evidence which fits in any of these categories.

fer, or that it is any more difficult for new entrants to obtain financing than incumbents. *Cf. Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir.1991) (a jury could not reasonably find cost of equipping a physician's office to be a significant entry barrier where evidence does not permit comparing that cost to potential competitors' resources or expected returns). The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier. *See* 2 Areeda & Turner, *Antitrust Law* ¶ 409e at 303 ("The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm."). Thus, the record does not support a finding of significant entry barriers.

The fundamental problem in this case is that L.A. Land pursued a flawed theory which the district court should not have sent to the jury. L.A. Land's antitrust theory was a source of considerable confusion and controversy throughout this litigation in the district court. Early on in the case, L.A. Land chose *not* to allege that Brunswick monopolized the market for bowling equipment—that is, L.A. Land specifically eschewed a supply monopoly theory; consequently, it was precluded from obtaining discovery on that theory. Throughout the litigation, the question surfaced whether L.A. Land could prove its case without showing monopolistic control over the supply of equipment and access to lenders and builders. The district court on several occasions expressed its doubt about L.A. Land's theory,[5] but sent it to the jury

[5] In its February 27, 1989 order denying Brunswick's first motion for summary judgment, the court stated the following:

> On the present record, plaintiffs have not met their burden of submitting sufficient evidence to make out a prima facie case for all the elements of the alleged antitrust offenses. Nevertheless, the Court believes that plaintiffs should have more time to engage in discovery to support their claims. . . .

nonetheless. For example, in denying Brunswick's mid-trial directed verdict motion, the court stated:

> I have decided to deny the motion. However, in denying the motion, I do not want to indicate that I think there is not any merit in what the defendants say. I think that there is enough to go to the jury, but I must tell you, Mr. Disner, that there are a couple of things in there that bother me tremendously and what bothers me is that . . . because there were other lenders and there were other builders available, you just wonder if they couldn't have gone to those builders or those lenders, and that has been a problem all during the time we were arguing the motion.

R.T. at 1648.

In the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market. *Cf. Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir.1989).[6] L.A. Land never alleged that Bruns-

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The Court cautions plaintiffs, however, that the theory of their case is confused and problematic.

Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.

Because L.A. Land rejected a supply monopoly theory, it apparently never did offer proof that Brunswick, as a supplier, controlled all sources of financing.

[6] In *Indiana Grocery*, the court observed that "[t]he output of the Indianapolis retail grocery market is, of course, groceries, *and Indiana Grocery concedes that Kroger could never control the sup-*

wick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist.[7] A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market. The theory which L.A. Land did pursue, however, apparently led it to focus on proof of particular anticompetitive acts and leave unsatisfied the requirement that it show Brunswick possessed the power to control prices or exclude competition. Consequently, because the evidence does not support a finding of monopoly power, the antitrust claim must fail. *See Syufy*, 903 F.2d at 671 n. 21 (plaintiff can not prevail on section 2 claim without proof of defendant's power to exclude competition).

B. Tort Claims

L.A. Land's tort claims were based on Brunswick's alleged interference in L.A. Land's business relationships with DCC and Timberlake. In order to succeed at trial on its claims of tortious interference with prospective economic advantage, L.A. Land had to prove these elements: (1) an economic relationship containing the probability of future economic benefit to L.A. Land; (2)

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ply of groceries in the Indianapolis retail market. If so, it is very difficult to see how Kroger could ever restrict total market output and thereby raise prices." *Id.* (emphasis in original). The court further noted that "while market share may indicate market power in certain cases, the two are not necessarily the same. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output." *Id.* By failing to prove a supply monopoly. L.A. Land essentially failed to prove that Brunswick controlled access to the productive assets of the retail bowling services market.

[7] The jury could have inferred from the evidence presented, however, that Brunswick was a desirable supplier at the relevant time.

knowledge by Brunswick of the existence of the relationship; (3) intentional acts on the part of Brunswick designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to L.A. Land proximately caused by Brunswick's acts. *Buckaloo v. Johnson*, 14 Cal.3d 815, 122 Cal. Rptr. 745, 752, 537 P.2d 865, 872 (1975).

The jury specifically answered in the affirmative the question whether Brunswick "intentionally and improperly interfere[d], without justification or privilege, with any prospective economic advantage of" L.A. Land. The jury further replied affirmatively to the question whether "any such act of interference proximately cause[d] damage" to L.A. Land. Because the form of verdict did not distinguish between Brunswick's alleged interference in L.A. Land's relationship with DCC and in its relationship with Timberlake, we consider both claims.

1. L.A. Land-DCC Relationship.

Brunswick argues that, as a matter of law, L.A. Land's allegations fail to support a tort claim because Brunswick was not a stranger to the relationship between L.A. Land and DCC, and indeed had a financial stake in that relationship. Brunswick contends, relying on *Gianelli Distributing Co. v. Beck & Co.*, 172 Cal.App.3d 1020, 219 Cal. Rptr. 203, 221 (1985), that evidence in the record must support a finding of an independent economic relationship between L.A. Land and DCC. Brunswick correctly asserts that evidence in the record instead shows that, because of its agreement with DCC, Brunswick was a necessary party to the prospective relationship between DCC and L.A. Land. *See, e.g.*, R.T. at 2275 (testimony by DCC official: "We weren't willing to make loans on new centers without some form of recourse guarantee[] from Brunswick so we wouldn't have made any of these loans without it."); R.T. at 2263 (testimony that DCC required Brunswick to prepare loan

application packages for potential purchasers); R.T. at 2276 (testimony that DCC required Brunswick to prepare market surveys as part of loan packages because of Brunswick's superior knowledge of bowling industry).

L.A. Land does not point to any evidence which indicates an independent relationship between itself and DCC, or which contradicts evidence that DCC would not be in the business of financing equipment purchases by Brunswick's customers without Brunswick's financial participation and information-gathering. Instead, L.A. Land counters Brunswick's argument by asserting that Brunswick's defense that its interference was justified by its repurchase obligations under the DCC-Brunswick agreement is pretextual because there was no evidence that any perceived risks motivated Brunswick to discourage DCC from lending to L.A. Land. Apparently, L.A. Land fails to see that the issue is not Brunswick's motivation for interference as a matter of fact, but whether the tort claim falls as a matter of law because Brunswick was not a third party to the prospective relationship between L.A. Land and DCC. Brunswick could not have "interfered" if there was no independent economic relationship between DCC and L.A. Land in which to interfere. *See Kruse v. Bank of America*, 202 Cal.App.3d 38, 248 Cal.Rptr. 217, 234 (1988) ("The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*.") (emphasis in original), *cert. denied*, 488 U.S. 1043, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989).[8] Thus, we conclude that Brunswick has the better argument on this issue.

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[8] Contrary to an assertion by L.A. Land in this appeal, Brunswick's reliance on *Kruse* does not mean that its argument rests on the premise that it and DCC were "identical." Given the evidence in the record that Brunswick was not a disinterested "third party" to the relationship between L.A. Land and DCC, *Kruse* merely supports the proposition that L.A. Land's allegations do not state a tort claim as a matter of law because Brunswick was not a third party.

L.A. Land also contends that Brunswick's argument is "moot" because Brunswick did not request the jury to be instructed on the issue of L.A. Land's independent relationship with DCC. L.A. Land cites no authority for this proposition, and we reject it on the basis of *Air-Sea Forwarders,* which holds that the truly applicable law rather than the jury instructions governs review of a denial of a directed verdict or judgment notwithstanding the verdict. 880 F.2d at 182-83 & n. 5. Finally, L.A. Land argues that Brunswick's defense does not apply because the jury implicitly found malicious conduct by awarding one dollar in punitive damages. The only authority which L.A. Land provides to support this contention is a "Cf." citation to a case, *Lowell v. Mother's Cake & Cookie Co.,* 79 Cal.App.3d 13, 144 Cal.Rptr. 664 (1978), which does not support its proposition either directly or inferentially. We are aware of no other authority which supports L.A. Land's argument.

2. L.A. Land-Timberlake Relationship.

Brunswick argues that because it and L.A. Land were competitors for the services of bowling center builders, the "privilege of competition" protects it from liability for the pressure it applied on Timberlake not to build for L.A. Land. *See Buckaloo,* 122 Cal.Rptr. at 752, 537 P.2d at 872 ("Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition."). Assuming without deciding that the record supports a finding that Brunswick prevailed upon Timberlake not to deal with its competitor, a number of authorities establish that Brunswick had the right under state law to do so.

In *A-Mark Coin Co. v. General Mills, Inc.,* 148 Cal. App.3d 312, 195 Cal.Rptr. 859, 867 (1983), the court held that a firm's interference with another's prospective economic relation falls within the privilege of competiton as long as: (1) the relation concerns a matter involved

in the competition between the firm and the other; (2) the firm does not employ wrongful means; (3) the firm's action does not create or continue an unlawful restraint of trade; and (4) the firm's purpose is "at least in part" to advance its interest in competing with the other. *Id.* (quoting Restatement (Second) of Torts § 768.) This court confirmed in *Pacific Express* that a firm's motive need only stem *in part* from a genuine competitive purpose. 959 F.2d at 819-20. Because the record shows that L.A. Land's contractual relations with Timberlake were "merely contemplated or potential," Brunswick was free to "refuse to deal with third parties [e.g., Timberlake] unless they cease dealing with" L.A. Land. *A-Mark Coin,* 195 Cal.Rptr. at 867 (internal quotation omitted); *see New Kids on the Block v. News America Publishing, Inc.,* 971 F.2d 302, 310 (9th Cir.1992). L.A. Land points to no evidence in the record that shows Brunswick's sole motive in wedging itself between L.A. Land and Timberlake, if it did so at all, was other than to advance its own economic interest, or that otherwise suggests that the conditions for the privilege outlined above did not exist.[9]

In addition, L.A. Land's proposition is belied by the facts of *A-Mark Coin,* which did not involve competition for a customer, but rather for a particular good. In that case, the court held that the privilege of competition protected the actions of a successful bidder for a coin collection against an allegation by the unsuccessful bidder of intentional interference with prospective economic advantage. *A-Mark Coin,* 195 Cal.Rptr. at 861-64. Thus, Brunswick's conduct with respect to Timberlake is privileged.

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[9] An exception is that L.A. Land does assert (presumably relying on evidence pertaining to the antitrust claim) that the interference here created an unlawful restraint of trade. Because we reverse the district court's judgment on the antitrust claim, no basis for this assertion remains.

IV. CONCLUSION

We conclude that the evidence regarding the antitrust claim does not support a finding that Brunswick possessed monopoly power. We further conclude that L.A. Land's claim that Brunswick interfered with its prospective relationship with DCC fails as a matter of law because Brunswick was not a stranger to that relationship. Also, the privilege of competition protected Brunswick's conduct with respect to the prospective relationship between L.A. Land and Timberlake. Therefore, we reverse the district court's judgment and remand with directions to enter judgment in favor of Brunswick on L.A. Land's claims of both monopolization and tort. Consequently, we deny L.A. Land's request for attorneys' fees on appeal.

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-5285 MRP

LOS ANGELES LAND CO., *et al.*

v.

BRUNSWICK CORP., *et al.*

Filed December 23, 1991

For plaintiffs: Eliot G. Disner and Beverly Tillett Pine, of Shapiro, Posell & Close, Los Angeles, Cal. For defendants: Richard J. Favretto, Roy T. Englert and Robert J. Kriss, of Mayer, Brown & Platt, Washington, D.C., and Chicago, Ill.

Order

PFAELZER, D.J.: The Court, having read and considered the post-trial motions of the parties, having heard oral argument by counsel, and having taken the motions under submission on August 12, 1991, now rules on these motions as follows:

1. With respect to defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur, Judgment Notwithstanding the Verdict is granted as to the state law claims of breach of contract and wrongful denial of contract. With respect to the claims for violation of § 1 [sic] of the Sherman Act and for intentional interference with prospective economic advantage, the motions are denied.

2. Plaintiff's Motion for Injunctive Relief under 15 U.S.C. § 26 is denied.

3. Plaintiff's Motion for an Order and Judgment Finding that Defendant Brunswick Corporation Violated the California Unfair Competition Statutes and for Injunctive Relief is denied.

4. Plaintiff's Motion for Award of Attorney's Fees, Expenses and Costs is granted as follows:

a. The Court awards the sum of $1,282,501.50 attorney's fees, based upon the following findings:

1. Having taken into consideration the factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, *sub nom.* and *Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), the Court makes several findings, the key finding being that this was neither a novel nor a particularly difficult case. The case did not require exceptional skill, although in fact it was tried with a high degree of competence by counsel whose experience, reputation, and ability are well known to the Court. The Court cannot conclude that the case was particularly undesirable or that it would have been more than normally difficult to find counsel who would accept the case.

2. The Court does not find it appropriate to grant attorney's fees for the services of Ronald F. Greenspan who was the only officer in the plaintiff company who knew anything at all about the case. Without his testimony as a percipient witness, there would have been no case on any theory. Thus, although Mr. Greenspan is a member of the bar, it is clear he did not act as counsel in this case. Accordingly, the Court deducts $79,740.00 for fees sought on account of Mr. Greenspan and finds that the remaining hours spent and the hourly rate for each attorney are reasonable for the work done.

3. The Court further finds that there should be no adjustment for the increase in hourly rates during the time

the case was pending and that no multiplier should be applied, the award being adequate to compensate plaintiff's counsel for the services rendered in this case. No reduction is made for the failure of plaintiff to prevail on the motion to disqualify counsel, as plaintiff did partially succeed on that motion, nor for the hours spent to prove the state law claims. The hours spent to prove the Sherman Act claim necessarily included those required to prove the state law claims. Proof of the federal claim is essentially the proof required to prove the state claims. Accordingly, the Court finds that the fees solely related to the successful interference claim are *de minimis*. However, plaintiffs have acquiesced to a reduction of their fees by $48,632.10, which should be more than sufficient to treat this problem if there is one. Therefore, the Court further deducts the sum of $48,632.10 from fees sought.

b. The Court awards additional costs of suit in the sum of $106,694.00.

c. The Court awards taxable costs in the sum of $46,779.33.

5. In accordance with the above rulings, the Court orders that an Amended Judgment in the form of Exhibit A attached hereto be entered on the tenth day following entry of this Order and that Stay of Execution of Judgment entered by the Court on May 13, 1991 is hereby ordered terminated ten business days from the date of entry hereof.

THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-05285 MRP (GHKx)

LOS ANGELES LAND COMPANY, a California corporation; SIERRA PALM PARTNERS, A CALIFORNIA LIMITED PARTNERSHIP; and WEST LANES, INC., a California corporation,

Plaintiffs,

vs.

BRUNSWICK CORPORATION, a Delaware corporation; LEISERV, INC., a Delaware corporation; and BRUNSWICK BOWLING & BILLIARDS CORPORATION, a Delaware corporation,

Defendants.

AMENDED JUDGMENT

Filed Dec. 23, 1991

Entered Jan. 6, 1992

This action came on for trial before the Court and a jury, the Honorable Mariana R. Pfaelzer, District Judge, presiding. The issues were duly tried and a properly constituted jury rendered its Verdict on May 3, 1991 (copy attached hereto as Exhibit 1 and incorporated herein). On May 13, 1991 this Court entered Judgment consistent therewith, which was then stayed to consider all anticipated post-trial motions. On December 11, 1991 the Court ruled on said post-trial motions (copy of Civil Minutes attached hereto as Exhibit 2 and incorporated herein). Accordingly, IT IS HEREBY ORDERED AND ADJUDGED:

1. Under Section 2 of the Sherman Act (15 U.S.C. § 2) for unlawful monopolization, plaintiff Los Angeles Land Company shall recover from the defendant Brunswick Corporation:

a. the sum of $5,056,000; said sum to be trebled to $15,168,000 (pursuant to 15 U.S.C. § 15), plus interest thereon at an annual rate of 6.04 percent, to be calculated daily from May 13, 1991, compounded annually to the date of payment, until said sum has been paid in full (pursuant to 28 U.S.C. § 1961);

b. plaintiff's reasonable attorneys fees in the amount of $1,282,501.50 (pursuant to 15 U.S.C. § 15);

c. plaintiff's additional costs of suit in the sum of $106,694.00 (pursuant to 15 U.S.C. § 15);

d. plaintiff's taxable costs in the sum of $46,779.33 (pursuant to 28 U.S.C. § 1920); and

e. interest on the sum of $1,435,974.80 (the total of subparts 1(b)-(d)) at an annual rate of 6.04 percent, to be calculated daily from the date of entry hereof, compounded annually to the date of payment, until said sum has been paid in full (pursuant to 28 U.S.C. § 1961).

2. In the alternative, under California law for intentional interference with prospective economic advantage, plaintiff Los Angeles Land Company shall recover from the defendant Brunswick Corporation:

a. the sum of $5,056,000;

b. punitive damages in the sum of $1.00;

c. interest thereon at an annual rate of 6.04 percent, to be calculated daily from May 13, 1991, compounded annually to the date of payment, until said sum has been paid in full, pursuant to 28 U.S.C. § 1961.

IT IS SO ORDERED.

/s/ Mariana R. Pfaelzer
Judge

DATED: December 22, 1991

Submitted by:

/s/ Eliot G. Disner
One of Plaintiffs' Attorneys
ELIOT G. DISNER, ESQ.
BEVERLY TILLETT PINE, ESQ.
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(310) 277-1818

Dated: 12/19/91

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-05285 MRP

LOS ANGELES LAND COMPANY, a California corporation; SIERRA PALM PARTNERS, a California limited partnership; a WEST LANES, INC., a California corporation,

Plaintiffs,

vs.

BRUNSWICK CORPORATION, a Delaware corporation; LEISERV, INC., a Delaware corporation; and BRUNSWICK BOWLING & BILLIARDS CORPORATION; a Delaware Corporation,

Defendants.

VERDICT

[Filed May 3, 1991]

We have considered the evidence presented in this case, have listened to and obeyed the Instructions of the Court as to the appropriate law to be applied, and now enter our Verdict. In accordance with those Instructions, we find the following as to plaintiffs Los Angeles Land Company (L.A. Land), Sierra Palm Partners (Sierra Palm), and West Lanes, Inc. (West Lanes), and defendants Brunswick Corporation (Brunswick Corporation), Leiserv, Inc. (BRC), and Brunswick Bowling & Billiards Corporation (Brunswick Division or BBBC).

I. FEDERAL LAW—MONOPOLIZATION

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

A. Did the defendants have monopoly power in the relevant market?

yes.

B. If so, did any of the defendants willfully maintain that power through restrictive or exclusionary conduct, as opposed to legitimate competitive behavior?

yes.

C. Did the defendants' activities occur in or affect interstate commerce?

yes.

D. Was any plaintiff injured in its business or property because of any defendant's restrictive or exclusionary conduct?

yes.

(If *any* of your answers to I. A, B, C or D are "no," proceed to Part II. If *all* of your answers to I. A, B, C and D are "yes," proceed to I. E)

E. If your answer to I. is "yes," which defendant or defendants?

Brunswick Corporation	X
BRC	
Brunswick Division	

F. As to each defendant to which you answered "yes" in I. E., for what amount do you find the defendant liable to the plaintiffs?

Brunswick Corporation	$5,056,000
BRC	
Brunswick Division	

II. CALIFORNIA STATE LAW CLAIMS

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

A. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

1. Did any defendant intentionally and improperly interfere, without justification or privilege, with any prospective economic advantage of any plaintiff?

   yes.

(If your answer to II. A. 1 is "no," proceed to II. B.; if your answer to II. A 1 is "yes," proceed to II. A. 2)

2. Did any such act of interference proximately cause damage to one or more plaintiffs?

   yes.

(If your answer to II. A. 2 is "no," proceed to II. B.; if your answer to II. A. 2 is "yes," proceed to II. A.3).

3. If you answer to II. A. 2 is "yes," which defendant or defendants proximately caused damage to plaintiffs?

   Brunswick Corporation X

   BRC _____

   Brunswick Division _____

4. As to each defendant you identified in response to II. A. 3, for what amount do you find the defendant liable to the plaintiffs?

   Brunswick Corporation $5,056,000

   BRC _____

   Brunswick Division _____

5. As to each defendant from which you awarded damages in II. A. 4, do you find by clear and convincing evidence that the acts of interference were done willfully, maliciously, despicably, and with the intent to injure one or more plaintiffs?

   yes.

(If your ansewer to II. A. 5 is "no," proceed to II. B; if your answer to II. A. 5 is "yes," you may then consider whether you should award punitive damages, and if you choose to do so, proceed to II. A. 6)

6. If you answer to II. A. 5 was "yes" as to any defendant, what amount of punitive damages, if any, do you choose to award from that defendant to plaintiffs?

   Brunswick Corporation $1.00

   BRC _____

   Brunswick Division _____

B. BREACH OF CONTRACT

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

1. Did West Lanes enter into a contract with the Brunswick Corporation or the Brunswick Division for the purchase of bowling equipment for Palmdale?

   yes.

2. Did West Lanes fully perform all of its obligations under the contract?

   yes.

3. Were all conditions precedent to the contract fulfilled by West Lanes?

   yes.

(If *any* of your answers to II. B. 1, 2 and 3 are "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If *all* of your answers to II. B. 1, 2 and 3 are "yes," proceed to II. B. 4)

4. Did the Brunswick Corporation or the Brunswick Division refuse to perform under the contract?

   yes.

(If your answer to II. B. 4 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. B. 4 is "yes," proceed to II. B. 5)

5. Was West Lanes proximately damaged as a result of such failure of the Brunswick Corporation or the Brunswick Division to perform under the contract?

   yes

(If your answer to II. B. 5 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. B. 5 is "yes," proceed to II. B. 6)

6. If your answer to II. B. 5 was "yes," identify which defendant or defendants whose failure to perform was the proximate cause of damage to West Lanes?

   Brunswick Corporation X

   Brunswick Division _____

7. As to each defendant you identified in response to II. B. 6, for what amount do you find the defendant liable to West Lanes?

   $5,056,000.

C. WRONGFUL DENIAL OF CONTRACT

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

1. If *all* of your answers to II. B. 1, 2, 3 and 4 are "yes," did the Brunswick Corporation or the Brunswick Division deny, in bad faith without probable cause, justification or privilege, and with no belief in the existence of a defense, the existence of a legally binding and enforceable contract between them and West Lanes?

   yes

(If your answer to II. C. 1 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 1 is "yes," proceed to II. C. 2)

2. If your answer to II. C. 1 was "yes," was West Lanes proximately damaged as a result of such bad faith denial of contract?

   yes

(If your answer to II. C. 2 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 2 is "yes," proceed to II. C. 3)

3. If your answer to II. C. 2 was "yes," identify which defendant or defendants whose bad faith denial of contract was the proximate cause of damage to West Lanes?

   Brunswick Corporation X

   Brunswick Division _____

4. As to each defendant you identified in response to II. C. 3, for what amount do you find the defendant liable to West Lanes?

   Brunswick Corporation $5,056,000.00

   Brunswick Division _____

5. As to each defendant from which you awarded damages in II. C. 4, do you find by clear and convincing evidence that the acts of interference were done willfully, maliciously, despicably, and with the intent to injure one or more plaintiffs?

   yes.

(If your answer to II. C. 5 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 5 is "yes," you may then consider whether you should award punitive damages, and if you choose to do so, proceed to II. C. 6)

6. If your answer to II. C. 5 was "yes" as to any defendant, what amount of punitive damages, if any, do you choose to award from that defendant to plaintiffs?

   Brunswick Corporation $1.00

   Brunswick Division _____

We have unanimously and voluntarily agreed to this Verdict.

DATED: 5/3/91

/s/ Geraldine Mays
Foreperson

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-88-5285-MRP

HON. MARIANA R. PFAELZER, Judge

LOS ANGELES LAND CO., *et al.*

vs.

BRUNSWICK CORP., *et al.*

CIVIL MINUTES—GENERAL

Date 12/11/91

PROCEEDINGS:

The Court, having read and considered the post-trial motions of the parties and heard oral argument on them, took the motions under submission on August 12, 1991. The Court now rules on these motions.

1. Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur is granted as to the state law claims for breach of contract and wrongful denial of contract. Judgment Notwithstanding the Verdict is granted as to these two claims. In all other respects, the motion is denied.

2. Plaintiff's Motion for Injunctive Relief under 15 U.S.C. § 26 is denied.

3. Plaintiff's Motion for an Order and Judgment Finding that Defendant Brunswick Corporation Violated the

California Unfair Competition Statutes and for Injunctive Relief is denied.

4. Plaintiff's Motion for Award of Attorney's Fees, Expenses and Costs is granted as follows:

a. Having taken into consideration the factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied, sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), the Court makes several findings, the key finding being that this was neither a novel nor a particularly difficult case. The case did not *require* exceptional skill, although in fact it was tried with a high degree of competence by counsel whose experience, reputation, and ability are well known to the Court. The Court cannot conclude that the case was particularly undesirable or that it would have been more than normally difficult to find counsel who would accept the case. Finally, the Court does not find it appropriate to grant attorney's fees for the services of Ronald F. Greenspan who was the only officer in the plaintiff company who knew anything at all about the case. Without his testimony as a percipient witness, there would have been no case on any theory. Thus, although Mr. Greenspan is a member of the bar, it is clear he did not act as counsel in this case. Accordingly, the Court deducts $79,740.00 for fees sought on account of Mr. Greenspan and finds that the remaining hours spent and the hourly rate for each attorney are reasonable for the work done. The Court further finds that there should be no adjustment for the increase in hourly rates during the time the case was pending and that no multiplier should be applied, the award being adequate to compensate plaintiff's counsel for the services rendered in this case. No reduction is made for the failure of plaintiff to prevail on the motion to disqualify counsel as plaintiff did partially succeed on that motion, nor for the failure to succeed on some of the state law claims as plaintiffs did succeed on the claim for interference with

prospective advantage. The same efforts were necessary to prove any one of the state law claims as to prove all of them. Accordingly, the Court awards $1,146,490 in attorney's fees.

b. Out-of-pocket expenses in the amount of $98,705.06 are awarded.

c. Costs of suit in the amount of $47,198.93 are awarded.

Counsel for plaintiff is to prepare a proposed order reflecting these rulings and submit it to the Court by Monday, December 16, 1991.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55134

D.C. No. CV-88-5285-MRP

LOS ANGELES LAND CO.; SIERRA PALM PARTNERS;
WEST LANES, INC.,
Plaintiffs-Appellees,

v.

BRUNSWICK CORPORATION,
Defendant-Appellant.

ORDER

[Filed Nov. 12, 1993]

Before: GIBSON*, HALL and KLEINFELD, Circuit Judges.

Having been reviewed by the Court, Appellee's petition for rehearing is hereby DENIED.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

(2)

No. 93-1290

Supreme Court, U.S.
FILED
MAR 1 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY, PETITIONER

v.

BRUNSWICK CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED

Whether the court of appeals correctly concluded – after "'review[ing] the evidence on [the] factual issues in the light most favorable to [petitioner] and draw[ing] all reasonable inferences in its favor'" (Pet. App. 5a) under the "clearly established" *du Pont* test for monopoly power (*id.* at 6a) – that the evidence was insufficient to support the jury's finding that the owner of a single bowling center in an isolated portion of Los Angeles County possessed "monopoly power."

RULE 29.1 STATEMENT

Respondent Brunswick Corporation has no parent company and no subsidiaries other than wholly owned subsidiaries.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1290

LOS ANGELES LAND COMPANY, PETITIONER

v.

BRUNSWICK CORPORATION, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 6 F.3d 1422. The district court's only substantive opinion in this case (App., *infra*, 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1993. A petition for rehearing was denied on November 12, 1993. Pet. App. 36a. The petition for a writ of certiorari was filed on February 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Entry into the retail bowling business is easy. Uncontradicted testimony in the record of this case showed that there are 8000 bowling centers in the United States, and

as many as 100 new ones open each year.[1] Uncontradicted testimony in the record of this case shows that 45 new bowling centers opened in the United States in 1988. Brunswick supplied the equipment for 18 (40%) of them; the other 27 got equipment elsewhere.[2] Deutsche Credit Company (DCC) financed 12 (27%) of the equipment purchases; the other 33 bowling centers used their own capital or got financing elsewhere.[3] It is, in short, painfully obvious from the record in this case that one does not need to turn to Brunswick or to DCC in order to build a new bowling center.

Petitioner's response to these inconvenient facts (shown by uncontradicted evidence in the record) is to ignore them. Petitioner thus asserts at the outset (Pet. 2) that "Brunswick was the dominant manufacturer of bowling equipment purchased by new bowling centers in the United States."[4] It

---

[1] DSER 546-547, 791-792. In this brief in opposition, we use the following abbreviations to refer to the record below: "RT" means the Reporter's Transcript of the trial; "ER" means the Excerpts of Record filed with Brunswick's opening brief on July 29, 1992; "SER" means the Supplemental Excerpts of Record filed with petitioner LA Land's opening brief on October 7, 1992; and "DSER" means Defendant's Supplemental Excerpts of Record filed with Brunswick's reply brief on December 7, 1992.

[2] DSER 989-990; see also DSER 748-749, 792.

[3] DSER 989-990; see also DSER 986-987.

[4] Petitioner relies on anecdotes, salesmen's puffery, and an apparent assertion that new bowling centers will accept only an "integrated package" of bowling equipment and that only Brunswick offered such a package. With 27 out of 45 new bowling centers in the United States *not* buying their equipment from Brunswick, however, those assertions cannot possibly be correct. In any event, petitioner expressly abandoned in the district court the theory that Brunswick was dominant in equipment, telling the court it would "not purport to show" that Brunswick had a supply monopoly. DSER 738; see also Pet. App. 12a.

then makes the even more outlandish statement that "[DCC] was one of the very few lenders, if not the only lender, that would even consider extending credit for bowling equipment purchases in the relevant market during the relevant period." Pet. 3. Petitioner's assertion stands in marked contrast to the uncontradicted record evidence that 73% of all new bowling centers in the United States in 1988 did not obtain equipment financing from DCC, and to the court of appeals' correct statement that "some 19 different lenders have financed purchases of Brunswick equipment since 1986" (Pet. App. 11a).

This is, in short, not the case petitioner has described in the petition. We will now describe what this case *is*.

2. Petitioner claims that it wanted to build a bowling center in Palmdale, California. In 1988, the only bowling center in the isolated area of Los Angeles County known as the "Antelope Valley" was Brunswick's Sands Bowl in Lancaster, California. Petitioner claimed that, by having the only retail bowling center in the area, Brunswick had a "monopoly" within the meaning of Section 2 of the Sherman Act, 15 U.S.C. § 2. Pet. App. 2a-3a; 4/25/91 (p.m.) RT 43-44 (petitioner's closing argument to the jury).

It is undisputed that Brunswick was willing to sell petitioner bowling equipment if it paid the agreed price of approximately $1 million. RT 704. Petitioner's owner, Alan Goodman, had a personal net worth of $11 million; he could have come up with the necessary cash either out of his own pocket or by borrowing against his substantial personal assets. DSER 1030-1036. Instead, petitioner wished to purchase the bowling equipment on a highly leveraged basis with corporate debt, using the equipment as the collateral, under an established program in which DCC makes loans on Brunswick equipment if Brunswick first gathers the necessary financial information and agrees to guarantee the loan. DSER 786-788, 910-913, 917-921, 929-932, 978. Moreover, as a condition of the equipment purchase, petitioner

asked Brunswick to provide it with a letter promising that Brunswick would not build a competing center in Palmdale. DSER 113-120, 364-366, 549.

3. When DCC did not make the loan and Brunswick did not provide the no-competition letter but instead built its own center in Palmdale, petitioner did not build its bowling center. It did not use its own funds to buy the Brunswick equipment, nor did it buy equipment from any of the other sources from which it was indisputably available. Instead, petitioner sued Brunswick under Section 2. Petitioner contended that Brunswick caused the failure of petitioner's project – in particular its failure to obtain equipment financing – by (1) taking too long to send petitioner's loan application paperwork to DCC and (2) preparing a "market survey" (required by DCC) that concluded that there was room for one but only one new bowling center in Palmdale. Pet. App. 4a, 13a-14a; ER 108-119. (Petitioner also claimed, see Pet. App. 4a, that Brunswick interfered with its ability to secure the services of a particular construction company, but it is undisputed that petitioner had access to competent construction services if it could secure equipment financing. DSER 407-408, 432.)

Petitioner's case was plagued from the outset by confusion. See Pet. App. 12a. Thus, early on in the case, the district court denied Brunswick's summary judgment motion but commented:

> The Court cautions plaintiffs * * * that the theory of their case is confused and problematic.
>
> Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick

> control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.

App., *infra*, 4a. The district court was equally critical of petitioner's case when Brunswick moved for a directed verdict at the close of petitioner's evidence. See Pet. App. 13a (quoting RT 1648). Nevertheless, it allowed the case to go to the jury, which returned a general verdict in petitioner's favor.

4. On appeal to the Ninth Circuit, Brunswick argued that the antitrust verdict must be overturned on each of four grounds: (1) that the evidence was insufficient to show monopoly power; (2) that petitioner had failed as a matter of law and fact to prove exclusionary acts by Brunswick; (3) that petitioner had failed to prove causation; and (4) that petitioner's claimed damages were impermissibly speculative.[5] At oral argument, the court of appeals expressed in no uncertain terms its skepticism that petitioner had proved exclusionary acts by Brunswick causing harm to petitioner. Most pointed were the remarks of Judge Kleinfeld:

> [Brunswick's] position basically is, if you want to compete with us, compete, but do it on your own nickel. * * * What I saw as the crux of the case, really, the thing that prevented LA Land from getting into the market was they needed a promise not to compete by Brunswick; they needed a monopoly in the market in order to borrow the money, in order to participate in the manner that they wished. If you wouldn't give them a monopoly, then they didn't have the borrowing power to participate according to their business plan. You refused to give them a monopoly, you threatened to compete, that shot down their business plan, and they say that that's a violation of the

---

[5] Brunswick's fifth argument on appeal was that a tort judgment based on the same theories as petitioner's antitrust case could not stand. The court of appeals agreed. Pet. App. 14a-18a.

> antitrust laws, for you to threaten to compete. * * * [I]t's pro-trust rather than antitrust.

The Ninth Circuit nevertheless did not reach the "exclusionary act," causation, or damages issues.[6] Instead, it unanimously found it sufficient to "begin and end our inquiry with the question whether the record supports the jury's finding on the first element, i.e., that Brunswick possessed monopoly power in the relevant market." Pet. App. 6a. The panel reversed because it "believe[d] L.A. Land's whole antitrust claim founders on this issue." *Ibid.* Applying the "clearly established" test of *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), the court held – properly "[v]iewing the evidence in the light most favorable to" petitioner – that "the record simply does not support a finding that Brunswick had power to control prices or exclude competition" in the relevant market. Pet App. 6a.[7]

Petitioner claims that "the appellate court reversed the jury's verdict on the ground that Brunswick, *as a matter of law*, could not possess monopoly power." Pet. 6 (emphasis added). Nothing could be further from the truth.[8] The

---

[6] The petition is simply in error in asserting that "the Ninth Circuit accepted[ ] that Brunswick committed 'anticompetitive' acts to keep [petitioner] out of the market." Pet. 4. The Ninth Circuit merely "[a]ssum[ed] without deciding that the record fully supports findings" of anticompetitive acts. Pet. App. 10a. One can reliably glean the Ninth Circuit's negative view of petitioner's claims of exclusionary acts, however, not only from the oral argument comments but also from the court's directive (Pet. App. 14a-19a) to enter judgment in Brunswick's favor on the tort claims, claims that rested on the same factual basis as the exclusionary act claims asserted under federal antitrust law.

[7] Petitioner expressly concedes that use of the *du Pont* test was proper. Pet. 10.

[8] Perhaps petitioner is engaged in wordplay. It *is* true that "judgments that are not supported by the requisite minimum of proof are invalid *as*

Ninth Circuit held that *the evidence was insufficient* to show that Brunswick possessed such power. Reiterating again and again the fact-bound nature of its conclusions, the court said that, "[i]n the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market" (Pet. App. 13a),[9] and that "the evidence does not support a finding of monopoly power" (*id.* at 14a). And the court made it clear early in its opinion that it was *not* purporting to rule on any of the market power issues as a matter of law, as opposed to sufficiency of the evidence under the well-established "rational jury" standard: "The question whether a party possesses market power is essentially one of fact." Pet. App. 5a (citing *Oahu Gas Service, Inc.* v. *Pacific Resources Inc.*, 838 F.2d 360, 363 (9th Cir.), cert. denied, 488 U.S. 870 (1988)).[10]

In conducting its review of the sufficiency of the evidence, the court explicitly recognized that Brunswick's 100% share of the narrowly defined "market" in this case (*i.e.*, the one

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a matter of law." Griffin v. *United States*, 112 S. Ct. 466, 474 (1991). But when a court uses the phrase "as a matter of law" in *that* sense, it is describing a fact-bound conclusion, not a broad legal principle applicable across cases. *Ibid.*

[9] Petitioner repeatedly quotes this passage without acknowledging that it begins with the phrase "[i]n the factual circumstances of this case." See Pet. 7, 21.

[10] At no point did the court of appeals find it necessary to engage in any review more searching than traditional "sufficiency" review. In particular, the court placed no reliance whatever on *Brook Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993), *Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), or *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Petitioner's observations about those cases (Pet. 19-21), while perhaps of academic interest, have absolutely nothing to do with any question presented by the petition (see Pet. i) or by the court of appeals' opinion.

preexisting bowling center) could give rise to an inference of market power.[11] And it placed the burden on Brunswick to rebut that inference, not on petitioner to reinforce it. Pet. App. 6a-7a (quoting *Oahu*, 838 F.2d at 366) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other *evidence* of a defendant's inability to control prices or exclude competitors.") (emphasis added).[12]

Examining the record evidence in detail, the court held that no rational jury could find monopoly power in the face of the defendants' actual showing of such inability. Among other things, the court considered and rejected petitioner's contention that difficulty in obtaining the $1 million in equipment financing typically needed for a venture of this sort is an "entry barrier." Pet. App. 11a-12a. The court conceded, on the other hand, that petitioner would have prevailed on the monopoly power issue if it had shown that Brunswick had a monopoly in the supply of equipment, but

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[11] The trial judge entered a pretrial order narrowly defining the market as "retail bowling services." ER 94-96. Brunswick, however, made clear before trial its intention to show "that we do not have monopoly power because of having the Sands Bowl in the Antelope Valley – that we do not have the power * * * to raise price willy-nilly just because there are not other bowling centers in the market." DSER 318. The court ruled, "you are not foreclosed from doing that." *Ibid.* And that is precisely what Brunswick did. The Ninth Circuit held, in a portion of the opinion that the petition does not challenge, that the record established Brunswick's lack of power to control price. Pet. App. 8a; see also notes 34, 36, *infra*. Indeed, Brunswick's prices were lower than those charged by petitioner at *its* bowling centers. Pet. App. 8a.

[12] The petition concedes (at 7, 10-11) that the inference from Brunswick's 100% "market share" is rebuttable by a showing of low entry barriers, and the point was also conceded below (LA Land C.A. Br. 25-26). The petition also concedes (at 7-8 n.4) that this case does not present the question whether antitrust plaintiffs or defendants bear the burden of introducing evidence on barriers to entry.

petitioner had explicitly waived this issue. *Id.* at 14a ("A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market.").

Contrary to petitioner's claim, however, the court did not hold that proving a supply monopoly was the *only* way petitioner could prove monopoly power. The court stated that petitioner could prove entry barriers (and hence monopoly power) under either of two alternative definitions, but had failed to meet either one of them, and it gave four examples of entry barriers, none of which existed in this case:

> Barriers to entry may be defined as *either* "additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants," *or* "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-10 (1992 Supp.) (internal quotation omitted).[4] *The evidence of Brunswick's behavior * * * fits neither definition.*
>
> [4] The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants. Economies of scale may also be considered an entry barrier in some situations. Areeda & Turner, *Antitrust Law* ¶ 409b at 299-300 (1978). *L.A. Land points to no evidence which fits in any of these categories.*

Pet. App. 11a & n.4 (emphasis added).[13]

[13] Petitioner grudgingly concedes in two footnotes that the Ninth Circuit accepted these broad and flexible definitions of entry barriers. Pet. 14 n.7, 17 n.11. Petitioner proceeds to complain that the Ninth Circuit misapplied its own standards. See also Pet. 15 ("There was, in fact, evidence that would support the jury's verdict even under this overly narrow standard for entry barriers."). Of course, an allegation that the Ninth Circuit misapplied the standards it announced to a particular factual record is a matter of no concern to this Court. In any event, as we show

Notwithstanding all of the foregoing, petitioner throughout the petition treats it as conceded that there were significant entry barriers in this case. Pet. i, 8, 11, 13. The Ninth Circuit's opinion, however, reached the precise opposite conclusion. Compare Pet. 8 ("[t]he Ninth Circuit assumed entry was difficult") and Pet. 11 ("the court accepted – as it had to – that Brunswick possessed 100% of a relevant market in which entry was difficult") with Pet. App. 12a ("Thus, the record does not support a finding of significant entry barriers.").

5. Petitioner sought panel rehearing but did not seek rehearing en banc. The panel unanimously denied the rehearing petition on November 12, 1993, just two weeks after it was filed. See Pet. App. 36a.

ARGUMENT

The decision of the court of appeals is a fact-bound evaluation of the sufficiency of the evidence under settled legal principles. It simply does not present the two questions petitioner asks this Court to resolve because each of those questions *explicitly assumes* that there were barriers to entry (see Pet. i), whereas the court of appeals *held* (Pet. App. 12a) that there were not. Moreover, the decision is correct and is not in conflict with any decision of this Court or of another court of appeals.[14] No member of the panel dissented. Petitioner did not even *seek* review by the en banc court of appeals. Review by this Court of the fact-bound issues raised by petitioner on the unusual factual record in this case is plainly unwarranted.

---

below, the Ninth Circuit was correct when it held (Pet. App. 11a, 12a) that this record shows the absence of entry barriers under *any* standard.

[14] Petitioner does not claim a conflict with another court of appeals and concedes that *this* Court "has never spoken on" the questions it seeks to raise. Pet. 13.

1. a. Petitioner's principal argument is that "the Ninth Circuit's requirement that a differential entry burden be shown is erroneous as a matter of law." Pet. 16. But the Ninth Circuit imposed no such requirement.

What petitioner calls the "differential entry burden" theory is the theory of economist George Stigler, the 1982 Nobel Prize winner. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 409′, at 525 (Supp. 1993) (discussing "Stiglerian" and "Bainian" theories of entry barriers). "Under this definition a barrier to entry is identified by 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants.'" *Ibid.* (citing GEORGE STIGLER, THE ORGANIZATION OF INDUSTRY Ch. 6 (1968)). It is a definition of entry barriers long followed by the Federal Trade Commission. See *Echlin Manufacturing Co.*, 105 F.T.C. 410, 485 (1985); *B.F. Goodrich Co.*, 110 F.T.C. 207, 222 (1988). Had the Ninth Circuit adopted that theory of entry barriers, it would have had sound economic and legal support for doing so. See *Echlin*, 105 F.T.C. at 485 (the Stiglerian "definition is now widely accepted in the legal and economic communities").

But the Ninth Circuit did *not* adopt Stigler's definition. It held that the evidence was insufficient to support a finding of entry barriers under "[ ]either definition" of entry barriers, Stigler's or that of economist Joe S. Bain. Pet. App. 11a. Under Bain's broad definition (which the Ninth Circuit quoted with approval, *ibid.*), entry barriers are *any* "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." AREEDA & HOVENKAMP, *supra*, ¶ 409′, at 525 (citing JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956)). By endorsing and applying two alternative definitions of entry barriers – Stigler's relatively narrow definition and one of the broadest definitions to be found anywhere – the Ninth Circuit cov-

ered the waterfront of possible definitions.[15] It has, in short, *not decided* the issue that petitioner contends this Court should review.[16]

Petitioner contends that, notwithstanding its clear endorsement of the Bain entry barrier test as an alternative to the Stigler entry barrier test, the court of appeals *applied* only the Stigler test when it rejected petitioner's contention that the difficulty of obtaining financing for bowling equipment is a barrier to entry. Pet. 17 n.10. Petitioner is mistaken. In that portion of its opinion (Pet. App. 12a), the court of

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[15] Economists have developed *many* different definitions of entry barriers. See 1 RICHARD SCHMALENSEE & ROBERT D. WILLIG, HANDBOOK OF INDUSTRIAL ORGANIZATION 476-535 (1989) (60 pages of conflicting definitions of entry barriers preceded by the observation that "[t]he literature on the organization of markets is replete with definitions of barriers to entry"); Richard Schmalensee, *Ease of Entry: Has the Concept Been Applied Too Readily?*, 56 ANTITRUST L.J. 41, 42 (1987) ("economists do not have a single, precise, reliable way of measuring ease of entry"); *id.* at 45 (conclusions about entry barriers depend "entirely on exercise of judgment," and "[t]here is no standard textbook formula being used"). The courts have barely begun to scratch the surface of this debate:

> Unfortunately, the courts are further ahead in recognizing that entry analysis is important than they are in understanding or articulating the dimensions of that analysis. So far, the only decisions to discuss extensively what are and what are not entry barriers are FTC decisions, especially *Echlin* * * *.

Janusz A. Ordover & Daniel M. Wall, *Proving Entry Barriers: A Practical Guide to the Economics of New Entry*, ANTITRUST, Winter 1988, at 12, 12.

[16] Nor is the "definition" of entry barriers an issue ripe for this Court's determination – even if this were a case in which a lower court *had* settled on a single, definitive test – given that the issue has not yet "percolated" in the lower courts. See note 15, *supra*. In this regard, it is noteworthy that petitioner makes no claim of a circuit conflict on this issue.

appeals relied on neither Stigler nor Bain. Rather than rely on those *generalized* definitions of entry barriers, the court straightforwardly applied principles stated in Professor Areeda's treatise *specifically* applicable to the contention that "capital costs" constitute an entry barrier. 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 409e (1978). As the authors write: "The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm." *Id.* at 303. Petitioner cites no authority – and we are aware of none – suggesting that the Areeda/Turner definition of entry barriers *in the cost-of-capital context* is erroneous.[17] And, even if there were error of some sort in applying that definition, that fact hardly would make this a certworthy case without a showing – impossible on this record – that the *judgment* of the court of appeals was incorrect.[18]

b. Whatever theoretical debates one might engage in about the definition of entry barriers – debates the Ninth Circuit did *not* purport to resolve – the Ninth Circuit unquestionably reached the right result in holding that entry is easy in the retail bowling business and that Brunswick's one bowling center in Lancaster, California, did not constitute a "monopoly." As the court of appeals held, "the district

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[17] Petitioner mischaracterizes the pertinent quotation from the Areeda treatise as merely an "isolated statement[ ]" (Pet. 17 n.10). To the contrary, Areeda and Turner begin their discussion of capital costs by stating this as the generally applicable test in the financing context.

[18] *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions"); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("[t]his Court * * * reviews judgments, not statements in opinions"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 509-510 (1987) (opinion of Stevens, J.) ("this Court does not sit to edit the opinions of lower courts").

court should not have sent [this case] to the jury." Pet. App. 12a.

Despite disagreement about other subjects, virtually all economists agree that entry into *retail* markets is easy. See, *e.g.*, JOE S. BAIN, INDUSTRIAL ORGANIZATION 276-277 (2d ed. 1968) (citing both retail trades and "service industries" including local entertainment businesses as examples of industries in which entry is easy); EDWIN MANSFIELD, PRINCIPLES OF MICROECONOMICS 266-267 (3d ed. 1980) ("entry into retail trade tends to be quite easy" because "the capital and skill required for entry are generally rather modest"); WILLIAM G. SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION 205 (1979) ("Most retail and other services have low barriers."); LEONARD WEISS, ECONOMICS AND AMERICAN INDUSTRY 379, 384, 387 (1961) (retailing, including businesses of scale similar to bowling centers, tends to be competitive because "there seems to be a continuous supply" of new operators, "ready to appear whenever prospects are good, and often even when they are not").

This Court, too, has recognized that a single retail outlet is unlikely to have the kind of immunity from competition that would justify calling it a "monopoly" under Section 2. *du Pont*, 351 U.S. at 392-393 ("A retail seller may have in one sense a monopoly on certain trade because of location, as an isolated country store or filling station * * *. However, this power * * * is not the power that makes an illegal monopoly."). And with good reason: if retail establishments were treated as Section 2 monopolies despite ease of entry, there would be countless monopolies throughout the economy, all subject to the kind of constraints on efficient unilateral behavior that this Court recently warned against in *Spectrum Sports Inc.* v. *McQuillan*, 113 S. Ct. 884, 892 (1993). Thus, despite large nominal market shares, the law does not readily characterize local retail establishments as

Section 2 monopolies when new competitive entry is easy.[19] The record in this case overwhelmingly confirms that conclusion with respect to retail bowling services in Palmdale, California.

The fundamental fact disproving the existence of barriers to entry in the retail bowling business is that actual entry (and exit) has occurred constantly throughout the United States over many years.[20] Entry *has* occurred throughout

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[19] *E.g.*, *Metro Mobile CTS, Inc.* v. *NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 314 (3d Cir. 1982); see also *Ball Memorial Hospital, Inc.* v. *Mutual Hospital Insurance*, 784 F.2d 1325, 1335-1337 (7th Cir. 1986); *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); AREEDA & HOVENKAMP, *supra*, ¶¶ 518.3a-518.3b; WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 222, 477-479 (1982) ("[W]e can no longer accept as per se indicators of poor market performance evidence such as concentration * * *. Where markets are contestable, the presumption should be that intervention is unwarranted."); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (1981) ("Market share alone is misleading.").

[20] See RT 1147 (there are 8000 bowling centers in the country); RT 1168-1169, 1174 (of 8000 bowling centers in the United States, about 1 percent open and 1 percent close every year); RT 1670-1673 (there are 7500-8000 bowling centers in the United States; there are larger chains than Brunswick; new centers open near Brunswick centers all the time, in Southern California and elsewhere; specific examples of new non-Brunswick centers that have recently opened in competition with Brunswick centers in Southern California); RT 1881-1882 (Brunswick operates about 105 or 110 of the 7500-8000 bowling centers in the United States); RT 1891 (many bowling centers are "a logical expansion of an existing proprietor in a market who builds one more center and then another center"); RT 1931 (75-100 new bowling centers are built in the United States per year); RT 2415-2416 (American Bowling Congress publishes data that show how many new bowling centers have been certified every year; there were 45 new centers in 1988; Brunswick equipped 18 of

the country, and therefore just as easily *could* occur in Palmdale. That fact by itself precludes any finding of monopoly power. See ECONOMIC REPORT OF THE PRESIDENT 174 (Feb. 1994) ("Although market power is costly to society, these problems are of limited concern in markets in which new competition *can* quickly and easily appear. Then the exercise of market power is likely to be nonexistent or temporary * * *.") (emphasis added).

If Palmdale were differentiated in a relevant way from the rest of the United States, perhaps the history of entry and exit throughout the United States would not be conclusive, but Palmdale is not so differentiated. If anything, barriers to entry are *lower* in Palmdale than in other communities be-

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them, or 40%; DCC financed 12, or 27%); RT 2544 (Active West is the largest bowling center chain in Southern California); RT 1965-1968 (Brunswick takes a risk in every market that someone will "open[ ] a bowling center down the street"; specific examples of situations in which that has happened, including situations in which Brunswick has sold the equipment to the competitor); RT 536 (petitioner's witness discusses "five-fold increase in bowling centers" in the 1960s); RT 2518 (Alan Goodman, president of petitioner, discussing bowling center boom in the 1950s and 1960s: "I just thought that the equipment companies were so anxious to sell equipment that they would sell to everybody, and they would open up here and open up there and right across the street practically, and that created greater over-expansion and over-building"); RT 1659-1667 (describing bowling boom of the late 1950s and early 1960s: AMF and Brunswick "grew from very small companies to very large companies" by selling bowling equipment; "bowling centers were going up all over the country and a lot of people were getting into the business because it was very easy to get into the business"; Brunswick got into the retail bowling center business by repossessing equipment and centers); RT 61-62 (petitioner's opening statement) (in the Antelope Valley itself, a 24-lane center and a 10-lane center not owned by Brunswick have come and gone); RT 233 (10-lane A.V. Lanes closed in June 1987); RT 841-842 (24-lane center in Palmdale was a "qu[i]te good performer" but closed in 1979 because of a fire).

cause of Palmdale's rapid growth.[21] Thus, petitioner – far from urging that there are intrinsic barriers to entry in Palmdale – tried to prove at trial that Palmdale could absorb an instantaneous *tripling* of its capacity for bowling by going from one to three 40-lane centers.[22] Consequently, petitioner's theory of the case – that the market could support both petitioner's new bowling center and a new Brunswick bowling center – was fundamentally at odds with any notion that

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[21] *E.g.*, RT 64 (petitioner's opening statement) (discussing "Palmdale's incredibly fast growth" as "the fastest growing city in the State"); RT 98 (petitioner's opening statement) ("remember this is the fastest growing region in the State"); Exhibit 45 at 4-02948 ("phenomenal rate" of growth); RT 318 (petitioner's witness describes Palmdale as "one of the fastest growing cities in the nation at the time"); RT 389-390 (petitioner's witness: "[T]hat area was growing. I didn't know whether the area would support two [new bowling centers] at the time, but that area was growing so fast that presumably they, under any stretch of the imagination, could build another center, then or very soon."); RT 1254 (petitioner's damages expert: "Palmdale-Lancaster * * * [i]s the fastest growing or has been the fastest growing community in California in recent years. The population based on the 1990 Census in Palmdale-Lancaster is two hundred thousand people.").

[22] *E.g.*, RT 102-103 (petitioner's opening statement) (assertion that Palmdale could support two new 40-lane centers); RT 327 (petitioner's witness believes that two additional 40-lane centers would have been feasible in the Antelope Valley in 1988); RT 760 (petitioner's witness adopts the "view that even if [Brunswick] built a new bowling center in the Antelope Valley [petitioner] could have built [its] own center there and competed successfully against [Brunswick]"); RT 1275 (petitioner's damages expert: "the Palmdale-Lancaster area could have supported two new 40 center lanes [*sic*] as early as 1987"), 1287 ("there is adequate capacity for two centers and even more in that location"); RT 3102-3103 (petitioner's damages expert: 1990 Census data show that Palmdale-Lancaster "could certainly support three centers, * * * could easily support another center of 40 lanes with minimum competitive effects"); RT 3105 (petitioner's damages expert: "the position is even stronger today that there could be another 40 lane bowling center in Palmdale-Lancaster"); see also App., *infra*, 3a n.2.

Brunswick could maintain a retail monopoly by delaying or preventing petitioner's entry.[23]

When one focuses on what is needed to build a retail bowling center, it becomes equally clear that barriers to entry are not high and certainly are not under Brunswick's control. Land is freely available in many places; the availability of land and necessary city approvals in Palmdale is a matter of record in this case.[24] Construction services are likewise available from many competent builders, as petitioner expressly conceded.[25]

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[23] In a remarkable instance of self-contradiction, petitioner now argues that Palmdale was a "thin" market and that being a "thin" market "in itself constituted an entry barrier." Pet. 14. Petitioner never made that argument in the district court or court of appeals and may not raise it for the first time in this Court. *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner's position in the court of appeals was that "the relevant market was large enough to support *two* new centers of the size of the proposed Twin Cities Bowl, even using Brunswick's conservative ratio of 1,000 to 1." LA Land C.A. Br. 17 n.18 (emphasis in original). In oral argument before the Ninth Circuit, petitioner's counsel stated: "the Antelope Valley is slightly larger than Kansas City, Kansas, and slightly smaller than Anchorage, Alaska. It is not a one-horse town."

[24] RT 74 (petitioner's opening statement) (petitioner had obtained "numerous city approvals"); RT 349-351 (petitioner's witness describes petitioner's lease of land in Palmdale and various uses to which it was to be put); RT 392 (petitioner had gotten plans approved by the city); RT 926-930 (petitioner had various approvals); RT 1811-1812 ("there was property available in other places" in Palmdale); RT 2106-2107 (there is much vacant land around petitioner's proposed site in Palmdale).

[25] RT 675-676 (petitioner's witness concedes contractors other than Timberlake can build bowling centers); RT 1134-1136 (specific examples of bowling centers built by contractors other than Timberlake); RT 1167-1168 (Timberlake can build a bowling center in 90 days, but "anybody can fast track a building"); RT 1174-1175 (Timberlake does not build any number close to the 80 new bowling centers that open per year; the average time to

Bowling equipment is available from Brunswick, AMF, and used-equipment dealers, and petitioner expressly waived any claim of supply monopoly.[26] The only remaining thing

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build a bowling center is 6-7 months, and there are construction companies that can build a center in 6-7 months); RT 1781 (Timberlake built 25-30 centers in the entire 1980s); 4/25/91 (p.m.) RT 72 (petitioner's closing argument) ("Yes, there were other builders.[ ] That's not disputed here.").

[26] RT 312 (petitioner's witness admits that "AMF is a vigorous competitor of Brunswick"); RT 367-369 (petitioner solicited an equipment proposal from AMF but never gave it serious consideration because its "preference" was for Brunswick); RT 982 (third parties known as "itinerants" sell bowling equipment); RT 1107-1108 (Brunswick has competition from AMF and "an awful lot of competition from * * * the itinerants"); RT 1146-1147 (AMF and itinerants have expertise in installation of equipment); RT 1853 (colloquy between court and petitioner's counsel) (disclaimer of any showing that Brunswick has monopoly power in bowling equipment); RT 1869-1876 (describing "intense competition" Brunswick faces in sale of equipment, from "itinerants" and others); RT 1953-1956 (itinerants put together are larger than Brunswick; discussion of supply competition in general); RT 2415-2416 (American Bowling Congress publishes data that show how many new bowling centers have been certified every year; there were 45 new centers in 1988; Brunswick equipped 18 of them, or 40%; Deutsche Credit financed 12, or 27%); RT 2419 (Brunswick has lost sales to Murrey, Great Lanes Bowling Supply, AMF, Easy Score; most of the 60% of the equipment supply market not held by Brunswick is held by open market contractors (itinerants); Bowling Proprietor Magazine carries page after page of advertisements by these companies); RT 2439-2441 (proprietor does not have to buy equipment all from one source; there are many suppliers of pieces of equipment; typically lanes and pinsetters, the two most expensive pieces of equipment, are bought from open market contractor; other companies are available for all sorts of equipment, as shown by the ads in the back of Bowling Proprietor Magazine); RT 2576-2579, 2586-2595 (bowling industry expert) (by far the most cost-effective way to build a new bowling center is to buy used pinsetters and lanes, both of which were widely available throughout the industry in 1988; active market for used equipment in 1988 demonstrated through pages of magazines with advertisements for used equipment); RT 3155-3156, 3160-3163 (petitioner's rebuttal witness testifies about bowling centers in

of significance needed to build a bowling center – and the only thing petitioner claimed it lacked – was money to pay for the bowling equipment.

Not only is money not under Brunswick's control by any stretch of the imagination, but also the amount of money at issue is just $1 million, a modest amount – so modest, in fact, that petitioner's owner (who had a personal net worth of $11 million, DSER 1030-1036) bragged under oath that he could raise that amount in one hour with one phone call.[27] It is particularly modest in comparison to the *$5 million* in profits (after reducing to net present value) that petitioner's damages expert claimed petitioner would make net of its costs to build the center.

It cannot be seriously contended on this record that money is a barrier to entry.[28] In any event, there are *many* lenders

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the area with used equipment). See also Pet. App. 13a-14a ("L.A. Land never alleged that Brunswick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist").

[27] RT 2466-2468 (Alan Goodman, petitioner's owner, testified that if he needed one million dollars for a deal he was interested in he could get it "in one hour with a telephone call"); see also RT 2526-2531 (Goodman's personal net worth of more than $11 million); Ex. 1010 (same); RT 622 (equipment cost for petitioner's proposed Palmdale center was $1,200,000). Compare Schmalensee, *supra* note 15, 56 ANTITRUST L.J. at 47 ("really large initial capital costs," in the range of hundreds of millions of dollars, may temporarily raise entry barriers).

[28] It is of no moment that favorable credit terms were available under a Brunswick-sponsored program with DCC. In *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*Fortner II*), this Court credited a factual finding by the trial court that particular credit terms were "not otherwise available in the Kentucky area" (*id.* at 616) but held that "that kind of uniqueness will not give rise to any inference of economic power in the credit market" (*id.* at 622) because it merely

available for bowling equipment, as well as old-fashioned cash.[29] *Petitioner*, of course, had trouble finding financing. But that reflects only that petitioner's project was a bad credit risk, not that there are barriers to entry. See App., *infra*, 4a & n.3. Petitioner owns several bowling centers and, at the time of trial, had never made a profit in any full year at any center.[30] Moreover, it insisted on doing busi-

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reflected a seller's willingness to offer favorable credit in order to sell its product. So too here, "bowling equipment financing" can be characterized as "hard to obtain" even "[t]hough there was also evidence that some 19 different lenders have financed purchases of Brunswick equipment since 1986" (Pet. App. 11a). But that characterization does not mean that Brunswick had economic power either in the credit market or, derivatively, in the retail bowling "market." Indeed, the court of appeals noted that, "[b]ecause L.A. Land rejected a supply monopoly theory, it apparently never did offer proof that Brunswick, as a supplier, controlled all sources of financing" (*id.* at 13a n.5) and that "L.A. Land * * * failed to prove that Brunswick controlled access to the productive assets of the retail bowling services market" (*id.* at 14a n.6).

[29] RT 2222-2224 (examples of companies that have financed bowling equipment at one time or another); RT 2256-2257 (Sanwa Bank, Walter Heller and Company, Circle Business Credit, Merrill Lynch Capital Resources, Chrysler Credit, and "innumerable regional and local banks" have provided loans to Brunswick customers); RT 2357-2360 (more on other sources of financing); RT 2411-2413, 2443-2445 (many customers provide their own financing; "[t]here are literally thousands of banks and financing institutions out there who every day are lending money for worthy projects"; local banks are "a major source of financing of bowling equipment"; "people show up with cash"); RT 2542 (Chrysler Financial plans to make $30-$40 million of bowling loans over the next year); RT 2466-2468 (petitioner's owner testified that if he needed one million dollars for a deal he was interested in he could get it "in one hour with a telephone call"); RT 458-459 (petitioner sought but was denied financing by Imperial Bank and Sanwa Business Credit, both of which made bowling loans).

[30] See Ex. 1464 (records of petitioner's losses); Ex. 2365 (same); RT 688-690 (testimony about petitioner's losses); RT 2510-2511 (petitioner's Chaparral Lanes in San Dimas had to go through workout because the

ness on a highly leveraged basis, using other people's money and placing virtually all the risk on the prospective lender.[31]

The record does not show high sunk costs or scale economies in this industry. Bowling equipment can be and frequently is resold on the secondary market.[32] Land, particu-

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performance of the bowling center did not allow petitioner to meet its original payment schedule); 4/25/91 (a.m.) RT 46 (Chaparral Lanes had six-figure losses); Thomas Weigt Dep. (attached to 14 RT) 38 ("[F]inancing any bowling center or any office building or any marina or your home or my home is based on the amount of money that we can put down, what our income is, the likelihood that we will be able to pay it back, the collateral value, * * * many other issues. * * * [I]t's not an issue of a lending institution. It's an issue of a customer.").

[31] RT 723-724 (petitioner sought 18-26% rate of return for its investors; putting in more equity and less debt to buy equipment would have reduced yield to 14-15%); RT 2517-2520 (petitioner's owner confirms insistence on high leverage); see also RT 1884-1885 (bowling centers can be built on a highly leveraged basis, but high leveraging led to problems in the 1960s and still does today); RT 1931-1933 (highly leveraged bowling centers have trouble finding financing); RT 1936-1937 (bowling centers with good cash flow but no profits cannot stay in business).

[32] RT 596-597 (petitioner bought used equipment for its bowling center in San Dimas and recognizes that one can buy used Brunswick equipment from others); RT 747-748 (used AMF equipment also is available); RT 1107-1108 (Brunswick has competition from AMF and "an awful lot of competition from * * * the itinerants"); RT 1113-1114 (Brunswick faces competition in used equipment from itinerants, AMF, Murrey, and a variety of other brokers and dealers across the whole country); RT 1997-1998 (itinerants can get used equipment); RT 2503-2505 (Alan Goodman, petitioner's president) (there was an active secondary market in used equipment in late 1987); Ex. 1066 (petitioner's "private placement memorandum") at 23 ("there is an active secondary market for selling used bowling equipment"); RT 2576-2579, 2586-2595 (bowling industry expert) (by far the most cost-effective way to build a new bowling center is to buy used pinsetters and lanes, both of which were widely available throughout the industry in 1988; active market for used equipment in 1988 demonstrated through pages of magazines with advertisements for used equipment).

larly in Southern California, tended to appreciate in value at the time relevant to this case. The building housing a bowling center comes closest to being a significant sunk cost, but petitioner's damages expert testified that even the building appreciates in value. RT 3109. For that matter, operating bowling centers *themselves* can be and constantly are resold.[33] And the frequent entry and exit by "mom-and-pop" operations as well as large, established chains shows that there are no particular scale economies (although experienced proprietors tend to do better than the many inexperienced proprietors who try to run bowling centers).[34]

Finally, on *this* record no rational jury could fairly regard Brunswick's conduct as a "barrier to entry," even if (see Pet. 16 n.9) Section 2 requires no more in the way of entry barri-

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[33] RT 723-724 (petitioner planned to provide its investors their return on equity by selling the property at the end of ten years); RT 2535 (there are brokers who buy and sell bowling centers; the same companies make services available to investors considering building a new center); RT 2545 (witness personally has participated in the sale of more than 200 bowling centers with a market value of $150 million); RT 3142-3146 (petitioner's rebuttal witness testifies to his experience in bowling center acquisitions).

[34] The two largest bowling-center operators in the world are AMF and Fair Lanes. DSER 693. Petitioner has never claimed that Brunswick had the power to keep AMF, Fair Lanes, or other large chains such as Active West (the largest chain in Southern California, RT 2544) out of the Palmdale "market." Petitioner has argued that those chains have shown no *interest* in Palmdale, but that is irrelevant; what is at issue is *barriers* to entry, not actual entry. The looming *threat* of new entry precludes any monopolistic power to control price. See *Bacchus Industries, Inc.* v. *Arvin Industries, Inc.*, 939 F.2d 887, 894 (10th Cir. 1991); *United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 988 (D.C. Cir. 1990); *United States* v. *Syufy Enterprises*, 903 F.2d 659, 664 (9th Cir. 1990); *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 672 & n.3 (7th Cir. 1985), cert. denied, 475 U.S. 1129 (1986); *Echlin Manufacturing Co.*, 105 F.T.C. 410, 484 (1985); 2 AREEDA & TURNER, *supra*, ¶ 505.

ers than anticompetitive acts. Brunswick committed no anticompetitive acts, as is fully laid out in the briefs filed in the court of appeals.[35] In particular, petitioner's entire case turns on the theory that it was entitled to financing provided by DCC. But DCC provided financing *only* when Brunswick guaranteed the equipment customer's loan. See Pet. App. 15a (quoting RT 2275). And Brunswick plainly had no obligation to guarantee its competitor's financing. There is "no duty to finance a rival, regardless of reasonableness." AREEDA & HOVENKAMP, *supra*, ¶ 738′m, at 890.

Moreover, as the court of appeals quite rightly noted, petitioner "never alleged that Brunswick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist." Pet. App. 13a-14a. Particularly in a case such as this one – where the alleged anticompetitive acts are all supposedly inadequate forms of *assistance* by Brunswick – the alleged anticompetitive acts of a company that controls no essential facility or bottleneck resource should not be deemed an entry barrier. Entry barriers pertain to the ability to block entry *generally*, not the ability to block a *particular* potential entrant. See George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 820 n.50 (1992). Antitrust law, after all, protects competition, not competitors.[36]

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[35] Petitioner's statement that "the relevant facts are undisputed" (Pet. 13) is fanciful, at least if petitioner means to suggest that Brunswick does not dispute the "facts" stated in the petition, many of which are contrary to undisputed testimony or to concessions by petitioner's own witnesses. This Court may, of course, consider any argument supporting the judgment below that was presented to the court of appeals. *E.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1981); cf. *Northwest Airlines, Inc.* v. *County of Kent*, 62 U.S.L.W. 4103, 4106 (U.S. Jan. 24, 1994).

[36] Petitioner errs in suggesting that a market is characterized by entry barriers unless the defendant shows that entry *would* occur, rather than

2. Petitioner's second argument is that the Ninth Circuit erred by holding as a matter of law that "a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market." Pet. 17. Petitioner is right, of course, to suggest that such a holding would be erroneous. But petitioner is wrong to suggest that the Ninth Circuit held any such thing.

After a long discussion in which it carefully considered and rejected each of petitioner's claims that the record would allow a rational jury to find entry barriers (Pet. App. 7a-12a), the court of appeals observed (*id.* at 13a-14a):

> In the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market. L.A. Land never alleged that Brunswick had power to exclude from the

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that entry *could* occur. Pet. 12-13. Whatever the value of that test in a *merger* context, it would be quite perverse in the Section 2 context, where the absence of entry often reflects only that the defendant is *not* charging the kind of supracompetitive prices that invite entry. See *Syufy*, 903 F.2d at 668; *Waste Management*, 743 F.2d at 983 ("that such entry has not happened more frequently reflects only the existence of competitive, entry-forestalling prices"); *Echlin Manufacturing Co.*, 105 F.T.C. at 485 ("Complaint counsel suggests that entry barriers are high whenever it is unlikely that new firms will decide to enter the market. We cannot agree. Although high barriers indicate that entry is unlikely, reversing that statement goes too far."); ROBERT H. BORK, THE ANTITRUST PARADOX 195-196 (1978); Schmalensee, *supra* note 15, 56 ANTITRUST L.J. at 46 ("the lack of entry says nothing about barriers"); BAUMOL, PANZER & WILLIG, *supra* note 19, at 222 ("freedom of entry, indeed the mere threat of incursions by entrants into the market, may effectively discipline the monopolist, *even if entry is never successful*") (emphasis in original). The court of appeals observed in this case that petitioner "points to no actual evidence of supracompetitive pricing, and the record reveals none." Pet. App. 8a. The petition does not challenge that holding.

> market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist. A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market. [Citation and footnotes omitted.]

The quoted passage, on its face, demonstrates that the court was holding only that the *factual circumstances of this case* required petitioner to show a supply monopoly, not that all plaintiffs in all cases must show monopoly power in two different markets. The factual circumstances of this case so requiring were several. One was petitioner's failure to overcome defendant's point-by-point showing of the absence of any *other* barriers to entry. Another was petitioner's insistence on purchasing equipment from Brunswick even though equipment was available from other sources, coupled with its insistence on obtaining Brunswick-guaranteed financing from DCC even though money was available from other sources. One who claims (as petitioner did) that an equipment supplier has an *obligation* to assist a competitor in a downstream market by selling the competitor equipment, assisting the competitor to obtain financing, guaranteeing the competitor's financing, and doing all of this on the competitor's chosen timetable, should indeed be required to show that there was nowhere else to turn. The court of appeals held no more than that.

3. *Even if* this case presented the issues described in the petition, and *even if* this Court thought that the Ninth Circuit had resolved those issues incorrectly, and *even if* this Court thought that the record could sustain a determination that Brunswick's one bowling center in the Antelope Valley gave it "monopoly power" – all erroneous assumptions – it would still be inappropriate to grant certiorari in this case because petitioner wholly failed to establish actionable exclu-

sionary acts by Brunswick. The claims of "exclusionary acts" in this case were not only unprecedented, but ludicrous.

The principal "exclusionary act" alleged in the petition seems to be that Brunswick "delayed" transmission of petitioner's loan application paperwork to DCC. No court, however, has ever sought to elevate complaints about the speed with which paperwork is processed into violations of Section 2 of the Sherman Act, punishable by treble damages in federal court. It would be especially bizarre to transform "delay" into a Sherman Act violation in a case in which the party allegedly guilty of delay was to be the *guarantor of the loan* that the paperwork was designed to secure. If Brunswick did not want petitioner to get a loan, it did not have to "delay" petitioner's paperwork; all it had to do was refuse to guarantee the loan – which it had every right to do – and DCC would not have made the loan. See Pet. App. 15a (quoting RT 2275).

Furthermore, petitioner's complaints about "delay" are simply inconsistent with uncontradicted evidence in the record. The alleged "delay" ended on July 28, 1988, when Brunswick *did* forward the paperwork to DCC (see Ex. 54), or at the latest on August 10, 1988, when DCC decided on the basis of the forwarded paperwork not to make the loan (see DSER 519, 522, 524, 946-947, 949, 972-973). Yet petitioner itself waited until significantly later – *August 22, 1988* – to forward to Brunswick for transmission to DCC evidence of construction financing. DSER 39-50, 81-82, 133-135, 383, 397-401, 448, 902-903. Evidence of construction financing was a *sine qua non* of equipment financing. Petitioner's own witness admitted that "[DCC] would require a commitment letter from a construction lender as a condition to providing financing for" petitioner's proposed Palmdale bowling center and that "a construction financing commitment was a necessary first step before [petitioner] could get equipment financing." DSER 394. Petitioner cannot obtain treble damages for alleged "delay" that ended long

before petitioner stopped dragging its own feet on critical aspects of its financing application.

The "false market survey" claim in this case was equally risible. That claim (which is inconsistent with the theory that Palmdale exhibited high entry barriers) is that the market could support *two* new bowling centers, whereas Brunswick's market survey said that there was room for only one. Petitioner asked the jury to conclude that Brunswick actually disbelieved its own survey, although petitioner never tried to contradict the survey in 1988 and had not a shred of contemporaneous evidence that anyone at Brunswick believed the market could support two new centers.

As the district court pointed out, however, "[d]espite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center." App., *infra*, 4a. Moreover, petitioner admitted at trial that "[t]he actual words in it [the market survey] are true" (DSER 427). Petitioner prepared its own market survey (Ex. 1005), which did *not* state that the market could support two new centers. See DSER 331-332 (author of petitioner's own survey claims to have held this view in 1988 but admits that he never stated it to anyone). The market survey prepared for Brunswick's internal use reached the same conclusion as the challenged survey: "the market cannot support two new bowling centers." Ex. 70 at 4-06959; see also *id.* at 4-06960, SER 137; RT 1738. And, in the *coup de grâce* to petitioner's theory, petitioner's own witness admitted that, "to [his] knowledge, nobody on behalf of [petitioner] or any of its affiliated entities ever expressed one word of criticism about the methodology, the data or the conclusions in the Brunswick market survey to [DCC]." DSER 367-368.

No court has ever allowed an antitrust case to proceed based on after-the-fact criticisms of survey methodology in circumstances like these. To the contrary, the established law is that one in petitioner's position must prove not only the intentional falsity of the statements made by its competitor but also its own inability to neutralize them.[37] Indeed, Areeda and Turner "would go further and suggest that such claims should presumptively be ignored."[38] But petitioner claims a right to treble damages based on criticisms it *never* presented to *anyone* at a time when those criticisms might (if believed) have led to actual entry into the marketplace as opposed to a windfall recovery of treble damages.

Last but not least, were this Court to consider the merits, it would have to confront the fact that petitioner *refused* to buy equipment from Brunswick (and thus to enter the market) unless it received a letter from Brunswick promising that Brunswick would refrain from competing in Palmdale by building a new bowling center of its own. See DSER 113-120, 364-366. As Judge Kleinfeld aptly put it (see page 6, *supra*), petitioner pursued a "pro-trust" lawsuit. This Court should not grant certiorari in order to prolong that lawsuit, or to rehash the factual record in a case that is unprecedented in federal antitrust litigation and unlikely to arise ever again.

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[37] *E.g.*, *National Association of Pharmaceutical Manufacturers, Inc.* v. *Ayerst Laboratories*, 850 F.2d 904, 916 (2d Cir. 1988); 3 AREEDA & TURNER, *supra*, ¶ 738a, at 279.

[38] *Id.* ¶ 738c, at 281; see also AREEDA & HOVENKAMP, *supra*, ¶ 738'm, at 890 ("[o]ne who seeks the opinion of a monopolist about a rival product is entitled merely to an opinion, regardless of how sound or objective it is").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1994

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 88-5285 MRP

LOS ANGELES LAND COMPANY,
a California corporation;
et al.,

Plaintiffs,

v.

BRUNSWICK CORPORATION,
a Delaware corporation,

Defendant.

MEMORANDUM AND ORDER

[Filed Feb. 27, 1989]

Defendant Brunswick Corporation's Motion for Summary Judgment came on for hearing before the Honorable Mariana R. Pfaelzer on December 19, 1988. The Court, having heard argument and having considered the papers filed in support of and in opposition to the motion, denies defendant's motion.

DISCUSSION

Currently, defendant Brunswick[1] owns and operates the only bowling center in Palmdale, California, the "Sands Bowl." Plaintiffs Los Angeles Land Company, Sierra Palm Partners and West Lanes, Inc. have been attempting to construct and operate a competing bowling center, the "Twin Cities Bowl." Plaintiffs have failed, however, to obtain financing for their project; furthermore, plaintiffs have failed to find a contractor for it. Meanwhile, Brunswick has proceeded with its own plans to build its second bowling center in Palmdale.

The complaint in this action makes claims under Sections 1 and 2 of the Sherman Act and states pendent state statutory and common law claims as well. It seems clear that plaintiff's theory is that Brunswick, in order to maintain a monopoly over the Palmdale market for retail bowling services, prevented plaintiffs from building the Twin Cities Bowl. Despite the clarity of their generalized accusation that Brunswick caused the failure of the Twin Cities Bowl, however, plaintiffs have twice changed their factual theory of what Brunswick did to scuttle their project.[2]

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[1] Although this Memorandum and Order refer to Brunswick Corporation, the Court recognizes that plaintiffs' action fails to properly distinguish between defendant and its affiliated organizations: Leiserv, Inc. and Brunswick Bowling and Billiard's [*sic*] Corporation. The Court refers to the acts herein as acts of Brunswick for purposes of this Order only. Plaintiffs are required to reference the proper parties in all future papers.

[2] The complaint alleged that Brunswick had illicit understandings with a bank and a construction company. Plaintiffs claimed that pursuant to agreements with Brunswick, these parties engaged in a concerted refusal to deal with plaintiffs in the construction of their bowling center.

Later, in seeking to enjoin Brunswick from building its new bowling center, plaintiffs abandoned their theory of illicit agreements. Instead, plaintiffs argued that Palmdale could support only one new bowling center

Plaintiffs' current theory is that Brunswick interfered with plaintiffs' ability to obtain financing for the purchase of bowling equipment in two ways. First, Brunswick – which acted as an intermediary between plaintiffs and Deutsche Credit Corporation, the primary financier of bowling equipment purchases from Brunswick – allegedly delayed Deutsche in its review of plaintiffs' request for financing. Brunswick caused the delay by requesting irrelevant information from plaintiffs, refusing to forward needed information to Deutsche, and requesting that Deutsche put the application on the "back burner."

Second, plaintiffs claim that Brunswick submitted a false market survey to Deutsche; the survey stated that Palmdale could support only one new forty-lane bowling center. Plaintiffs argue that Brunswick's market study has so much influence over Deutsche's decisions that plaintiffs cannot obtain financing, now that Brunswick has commenced construction of a new center in Palmdale.

On the present record, plaintiffs have not met their burden of submitting sufficient evidence to make out a prima facie case of all of the elements of the alleged antitrust offenses. Nevertheless, the Court believes that plaintiffs should have more time to engage in discovery to support their claims. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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and that Brunswick alone delayed plaintiffs' efforts to secure financing for the Twin Cities Bowl, thereby breaching an affirmative duty to encourage competition.

Now, plaintiffs abandon the theory that Palmdale cannot support more than one new bowling center. The linchpin of plaintiffs' current theory is that Palmdale can support at least two new bowling centers and perhaps more.

which that party will bear the burden of proof at trial."). The Court cautions plaintiffs, however, that the theory of their case is confused and problematic.

Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.[3]

A final difficulty with plaintiffs' case is plaintiffs' failure to distinguish between the acts of defendant Brunswick and the acts of Brunswick's affiliates, the acts of Deutsche, and the acts of Timberlake. The Court will not impute, without a legally sound reason for doing so, the acts of others to defendant.

The Court recognizes defendant's frustration with plaintiffs' continually shifting legal and factual theories, and the Court wishes to warn plaintiffs that vague assertions of wrongdoing and eleventh-hour changes will not defeat a motion for summary judgment *after* plaintiffs have a reasonable time for discovery. A reasonable time for discovery in order to oppose a resubmitted motion for summary judgment is the end of July 1989. The Court is quite aware of the present discovery cut-off date, but is convinced that plaintiffs should be able to establish their prima facie case well before

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[3] *See* Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 29-30 (Both Heritage Leasing and First City Credit Corporation refused plaintiffs' application for financing based on reasons other than Brunswick's market study).

that time. Of course, that will require them to decide on a viable theory of recovery and support it by that time.

IT IS HEREBY ORDERED THAT defendant's Motion for Summary Judgment is denied without prejudice to its being resubmitted after plaintiffs have had a reasonable time for discovery.

DATED: February 27, 1989 /s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

Supreme Court, U.S.
FILED
MAR - 4 1994
OFFICE OF THE CLERK

No. 93-1290

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY,
Petitioner,
v.
BRUNSWICK CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER [1]

Rather than defending the reasoning of the court below, respondent Brunswick Corporation seeks to avoid confronting the questions presented. It takes two tacks in this effort: First, it reargues the evidence at length, overlooking the fact that a properly instructed jury has already weighed the evidence and found against it. Second, Brunswick seeks to recast the Ninth Circuit's ruling as simply a review of the sufficiency of the factual evidence to support the jury's finding, when the court below plainly overturned the jury verdict in reliance on legal rulings—rulings that form the basis of the questions presented in our petition. Neither effort should divert this Court from granting review to consider those important and recurring legal questions.

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[1] Petitioner's Rule 29.1 statement appears at Pet. ii.

1. Contrary to Brunswick's statement, Opp. at 5, the jury did not simply return a general verdict. The jury—pursuant to instructions to which Brunswick did not and does not object—returned a special verdict (set forth at Pet. App. 26a-32a) specifically finding that Brunswick possessed "monopoly power in the relevant market" and "willfully maintain[ed] that power through restrictive or exclusionary conduct, as opposed to legitimate competitive behavior." *Id.* at 27a. En route to its erroneous legal rulings, the Ninth Circuit expressly assumed that "the record fully supports findings that, as L.A. Land sought to prove at trial, Brunswick prepared a false or misleading market survey, delayed transmittal to DCC of L.A. Land's financing application, and prevailed upon Timberlake not to contract with L.A. Land"—findings that "support the conclusion that Brunswick committed anticompetitive acts." *Id.* at 10a.

Yet Brunswick devotes the bulk of its maximum-length opposition to retrying the case. It attempts to prove what the jury expressly disbelieved—that "Brunswick committed no anticompetitive acts." Opp. at 24. That factual dispute has already been decided, and Brunswick cannot make the purely legal questions presented in the petition appear fact-bound simply by trotting out in lengthy footnotes evidence not credited by the jury.[2]

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[2] Needless to say, our view of the evidence differs dramatically from that presented in Brunswick's opposition. To cite just one example, Brunswick repeatedly asserts that petitioner's owner "had a personal net worth of $11 million," apparently suggesting that the fact that "bowling equipment financing is hard to obtain" (Pet. App. 11a) may be overlooked in such circumstances. Opp. at 3, 20. The issue, however, is the characteristics of the market and whether entry barriers exist in that market, not the characteristics of a corporation's stockholder. Petitioner's owner was sufficiently illiquid so that raising the necessary funds required equipment financing; Brunswick's own executives testified that virtually all bowling centers are established on a leveraged basis, normally at the level petitioner intended to leverage its project. *See* Ex. 54A, 347 B-1, R.T. 719-724, 1662-63, 1941, 2531-32. In any event, the

2. a. Contrary to Brunswick's effort to rewrite the opinion below, the Ninth Circuit did not simply review the evidence and conclude that it was insufficient to support a finding of monopoly power. The court below instead accepted as given that (1) Brunswick controlled 100% of the relevant market, (2) Brunswick committed anticompetitive acts to keep L.A. Land out of that market, and (3) the jury could find that bowling equipment financing was difficult to obtain. The court below did not question the factual sufficiency of the evidence to support these propositions.

The lower court nonetheless overturned the jury verdict in favor of L.A. Land and the jury's express finding that Brunswick possessed monopoly power (Pet. App. 27a) because of two erroneous legal rulings. First, the Ninth Circuit ruled that there could be no monopoly power because there were no barriers to entry. The court acknowledged that "the jury was entitled to find that bowling equipment financing is hard to obtain," *id.* at 11a—not, as Brunswick would have it, that financing was hard only for L.A. Land to obtain. Opp. at 21. The Ninth Circuit then held that this barrier to entry could not be considered as such under Section 2 of the Sherman Act because, as a matter of law, only *differential* barriers to entry—greater burdens for new entrants than for incumbents—pose the necessary danger that defendant's monopoly will be preserved.

Given Brunswick's effort to obfuscate this plain legal ruling, we are compelled to quote the Ninth Circuit's own words at some length:

> [T]he jury was entitled to find that bowling equipment financing is hard to obtain. However, the jury could not rationally construe this factor as a barrier

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important point is that such factual disputes are in no way pertinent to the purely legal grounds for the decision below and the questions presented in the petition.

> to entry, *as there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms.* * * * The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents. * * * The disadvantage of new entrants *as compared to incumbents* is the hallmark of an entry barrier. [Pet. App. 11a-12a (emphasis added).]

This requirement of differential entry barriers is incorrect as a matter of antitrust law. The Ninth Circuit's embrace of that proposition puts it squarely in conflict with other circuits that have a much broader concept of entry barriers,[3] and resolution of that conflict and clarification of what constitutes an entry barrier is an important and recurring question demanding the attention of this Court.[4]

b. Brunswick agrees with us that it would be "erroneous" to hold that "a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market." Opp. at 25. Although that is precisely what the Ninth Circuit held in this case, *see* Pet. App. 13a-14a, Brunswick argues that

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[3] *See, e.g., Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 980, 1001 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

[4] The Ninth Circuit's error was compounded by its view, announced without any supporting authority, that "anticompetitive conduct by one firm against another is not an 'entry barrier'." Pet. App. 11a. *See* Pet. at 16 n.9. This erroneous view allowed the Ninth Circuit wholly to disregard the jury's express finding that Brunswick engaged in "restrictive or exclusionary conduct, as opposed to legitimate competitive behavior," which "injured" L.A. Land, Pet. App. 27a, and amply refutes Brunswick's assertion that the lower court "covered the waterfront of possible definitions" of entry barriers. Opp. at 11-12.

what it concedes to be an "erroneous" rule as a general matter is somehow acceptable in this case. The reason, according to Brunswick, is that L.A. Land supposedly claimed that Brunswick had an obligation to assist it in entering the market, and therefore L.A. Land "should indeed be required to show that there was nowhere else to turn." Opp. at 26.

That is of course not our claim, and never has been. Brunswick had no obligation to sell equipment to L.A. Land, or arrange financing for the sale. But once it undertook to do these things, it *did* have an obligation not to engage in anticompetitive acts in connection with them that were designed to keep L.A. Land out of the market. The jury, of course, expressly found that Brunswick did just that. Pet. App. 27a.

Thus, Brunswick's assertion that if it "did not want petitioner to get a loan, it did not have to 'delay' petitioner's paperwork; all it had to do was refuse to guarantee the loan," Opp. at 27, conveniently misses the point. What we argued to the jury, and what the jury accepted, was that Brunswick wanted L.A. Land to *believe* that it was willing to sell L.A. Land equipment and help finance the sale. L.A. Land would then rely on Brunswick, while Brunswick deliberately held up L.A. Land's application and circulated the deceptive market survey, which effectively dried up any remaining financing sources. *See* Pet. at 4-5.[5] In the meantime, Brunswick itself opened a second bowling center and thereby solidified its 100% monopoly. Simply "refus[ing] to guarantee the loan" would not have achieved Brunswick's anticompetitive objectives.

3. In our petition, we explained the critical role that the concept of entry barriers plays in antitrust analysis. *See* Pet. at 9-13. We noted that despite this critical role—

[5] Brunswick simply ignores the impact of the market survey in claiming ease of entry. *See* Opp. at 15-18.

which respondent in no way disputes—this Court has never spoken on the appropriate definition of entry barriers. Brunswick expressly acknowledges that this is so, Opp. at 10 n.14, and further concedes that the lower courts have thus far failed to settle on a uniform definition of what constitutes an entry barrier. *See* Opp. at 12 n.15 ("Unfortunately, the courts are further ahead in recognizing that entry analysis is important than they are in understanding or articulating the dimensions of that analysis") (quoting Janusz A. Ordover & Daniel M. Wall, *Proving Entry Barriers: A Practical Guide to the Economics of New Entry, Antitrust*, Winter 1988, at 12).

In the face of this acknowledged confusion, Brunswick retreats to the last refuge of a respondent on certiorari—an assertion that "the issue has not yet 'percolated' in the lower courts." Opp. at 12 n.16. In fact, the question of the appropriate definition of entry barriers has been "percolating" in the lower federal courts for several decades.[6] The result has been increasing uncertainty, not emerging consensus and clarity. Given the critical importance of entry barrier analysis to antitrust law, this Court should grant review to help resolve the conceded confusion in the lower courts.

This uncertainty in the lower courts is also reflected in the positions of the various governmental enforcement entities. Brunswick argues that the Federal Trade Commission adheres to the Ninth Circuit view that only differential entry barriers can confer monopoly power, Opp. at 11, and quotes the Economic Report of the President for the proposition that market power is of limited con-

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[6] *See, e.g., American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 530-531 (2d Cir. 1958); *A.G. Spalding & Bros., Inc.* v. *Federal Trade Commission*, 301 F.2d 585, 618-620 (3d Cir. 1962); *United States Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 604-605 (6th Cir. 1970); *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 981-982 (2d Cir. 1984); *Reazin*, 899 F.2d at 971-972.

cern "in markets in which new competition *can* quickly and easily appear." Opp. at 16 (quoting Economic Report of the President 174 (Feb. 1994) (emphasis added by Brunswick)). On the other hand, as we pointed out in the petition, the new Department of Justice Antitrust Division and Federal Trade Commission merger guidelines addressed entry barriers in detail because of concerns that entry arguments were being uncritically accepted. The new guidelines ask not whether entry *could* occur, but rather whether entry *would* occur. The Ninth Circuit's imposition of the highly theoretical "differential" definition of entry barriers is plainly at odds with this Federal Government enforcement policy. *See* Pet. at 12-13.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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